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American Bar Association
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RULES
CLIENT-LAWYER RELATIONSHIP

Rule 1.18 Duties to Prospective Client

Ellen J. BennettElizabeth J. CohenMartin WhittakerCenter for Professional Responsibility

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

COMMENT

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a ""prospective client" within the meaning of paragraph (a).

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to

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RULES OF SUPREME COURT OF VIRGINIA
PART SIX INTEGRATION OF THE STATE BAR
SECTION II. VIRGINIA RULES OF PROFESSIONAL CONDUCT
CLIENT-LAWYER RELATIONSHIP

Va. Sup. Ct. R. pt. 6, sec. II, 1.18 (2012)

Review Court Orders which may amend this Rule.

Rule 1.18. Duties To Prospective Client

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter; the disqualified lawyer reasonably believes that the screen would be effective to sufficiently protect information that could be significantly

harmful to the prospective client; and

(ii) written notice that includes a general description of the subject matter about which the lawyer was consulted and the screening procedures employed is promptly given to the prospective client.

NOTES: [1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. The principle of loyalty diminishes in importance if the sole reason for an individual lawyer's disqualification is the lawyer's initial consultation with a prospective new client with whom no client-lawyer relationship is formed, either because the lawyer detected a conflict of interest as a result of an initial consultation, or for some other reason (e.g., the prospective client decided not to retain the firm). Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who unilaterally communicates information to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a).

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The client may disclose such information as part of the process of determining whether the client wishes to form a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter and the lawyer believes that an effective screen could not be engaged to protect the prospective client.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client and the lawyer reasonably believes that an effective screen will protect the confidential information of the prospective client.

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Restatement of the Law, Third, The Law Governing Lawyers

Case Citations

Chapter 2 - The Client-Lawyer Relationship

Topic 1 - Creating a Client-Lawyer Relationship

Restat 3d of the Law Governing Lawyers, § 14

§ 14 Formation of a Client-Lawyer Relationship

A relationship of client and lawyer arises when:

(1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either

(a) the lawyer manifests to the person consent to do so; or

(b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or

(2) a tribunal with power to do so appoints the lawyer to provide the services.

COMMENTS & ILLUSTRATIONS: Comment:

a. Scope and cross-references. This Section sets forth a standard for determining when a client-lawyer relationship begins. Nonetheless, the various duties of lawyers and clients do not always arise simultaneously. Even if no relationship ensues, a lawyer may owe a prospective client certain duties (see § 15; § 60 & Comment *d* thereto). A lawyer representing a client may perform services also benefiting another person, for example arguing a motion for two litigants, without owing the nonclient litigant all the duties ordinarily owed to a client (see § 19(1)). Even if a relationship ensues, the client may not owe the lawyer a fee (see § 17 & Comment *b* thereto; § 38 & Comment *c* thereto; *Restatement Second, Agency § 16*). When a fee is due, the person owing it is not necessarily a client (see § 134). Moreover, a client-lawyer relationship may be more readily found in some situations (for example, when a person has a reasonable belief that a lawyer was protecting that person's interests; see Comment *d* hereto) than in others (for example, when a person seeks to compel a lawyer to provide onerous services). In some situations--for example, when a lawyer agrees to represent a defendant without knowing that the lawyer's partner represents the plaintiff--a lawyer is forbidden to perform some duties for the client (continuing the representation) while nevertheless remaining subject to other duties (keeping the client's confidential information secret from others, including from the lawyer's own partner).

When a client-lawyer relationship arises, its scope is subject to the principles set forth in § 19(1), and its termination is governed by §§ 31 and 32. Agency and contract law are also applicable, except when inconsistent with special rules applicable to lawyers. The scope of responsibilities may change during the representation.

b. Rationale. The client-lawyer relationship ordinarily is a consensual one (see *Restatement Second, Agency § 15*). A client ordinarily should not be forced to put important legal matters into the hands of another or to accept unwanted legal services. The consent requirement, however, is not symmetrical. The client may at any time end the relationship by withdrawing consent (see §§ 31, 32, & 40), while the lawyer may properly withdraw only under specified conditions (see §§ 31 & 32). A lawyer may be held to responsibility of representation when the client reasonably relies on the existence of the relationship (see Comment *e*), and a court may direct the lawyer to represent the client by appointment (see Comment *g*). Lawyers generally are as free as other persons to decide with whom to deal, subject to generally applicable statutes such as those prohibiting certain kinds of discrimination. A lawyer, for example, may decline to undertake a representation that the lawyer finds inconvenient or repugnant. Agreement between client and lawyer likewise defines the scope of the representation, for example, determining whether it encompasses a single matter or is continuing (see § 19(1); § 31(2)(e) & Comment *h*). Even when a representation is continuing, the lawyer is ordinarily free to reject new matters.

c. The client's intent. A client's manifestation of intent that a lawyer provide legal services to the client may be explicit, as when the client requests the lawyer to write a will. The client's intent may be manifest from surrounding facts and circumstances, as when the client discusses the possibility of representation with the lawyer and then sends the lawyer relevant papers or a retainer requested by the lawyer. The client may hire the lawyer to work in its legal department. The client may demonstrate intent by ratifying the lawyer's acts, for example when a friend asks a lawyer to represent an imprisoned person who later manifests acceptance of the lawyer's services. The client's intent may be communicated by someone acting for the client, such as a relative or secretary. (The power of such a representative to act on behalf of the client is determined by the law of agency.) No written contract is required in order to establish the relationship, although a writing may be required by disciplinary or procedural standards (see § 38, Comment *b*). The client need not necessarily pay or agree to pay the lawyer; and paying a lawyer does not by itself create a client-lawyer relationship with the payor if the circumstances indicate that the lawyer was to represent someone else, for example, when an insurance company designates a lawyer to represent an insured (see § 134).

The client-lawyer relationship contemplates legal services from the lawyer, not, for example, real-estate-brokerage services or expert-witness services. A client-lawyer relationship results when legal services are provided even if the client also intends to receive other services. A client-lawyer relationship is not created, however, by the fact of receiving some benefit of the lawyer's service, for example when the lawyer represents a co-party. Finally, a lawyer may answer a general question about the law, for instance in a purely social setting, without a client-lawyer relationship arising.

A client-lawyer relationship can arise even if the client's consent to enter into the relationship is not fully informed. The lawyer should, however, consult with the client about such matters as the benefits and disadvantages of the proposed representation and conflicts of interest. On consultation in general, see § 20. A lawyer who fails to disclose such matters may be subject to fee forfeiture, professional discipline, malpractice liability, and other sanctions (see §§ 15, 20, 37, 48, 121, & 122).

d. Clients with diminished capacity. Individuals who are legally incompetent, for example some minors or persons with diminished mental capacity, often require representation to which they are personally incapable of giving consent (see *Restatement Second, Agency § 20*). A guardian for such an individual may retain counsel for the incapacitated person, subject in some instances to court approval. A court also may appoint counsel to represent an incompetent party without the party's consent. A person of diminished capacity nevertheless may be able to consent to representation, and to become liable to pay counsel, under the doctrine of "necessaries" (see § 31, Comment *e*; § 39; *Restatement Second, Contracts § 12*, Comment *f*). Representing a client of diminished capacity is considered in § 24 (see also § 31, Comment *e* (client's incompetence does not automatically end lawyer's authority)).

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Restatement of the Law, Third, The Law Governing Lawyers

Case Citations

Chapter 2 - The Client-Lawyer Relationship

Topic 1 - Creating a Client-Lawyer Relationship

Restat 3d of the Law Governing Lawyers, § 15

§ 15 A Lawyer's Duties to a Prospective Client

(1) When a person discusses with a lawyer the possibility of their forming a client-lawyer relationship for a matter and no such relationship ensues, the lawyer must:

> **(a) not subsequently use or disclose confidential information learned in the consultation, except to the extent permitted with respect to confidential information of a client or former client as stated in §§ 61-67;**
>
> **(b) protect the person's property in the lawyer's custody as stated in §§ 44-46; and**
>
> **(c) use reasonable care to the extent the lawyer provides the person legal services.**

(2) A lawyer subject to Subsection (1) may not represent a client whose interests are materially adverse to those of a former prospective client in the same or a substantially related matter when the lawyer or another lawyer whose disqualification is imputed to the lawyer under §§ 123 and 124 has received from the prospective client confidential information that could be significantly harmful to the prospective client in the matter, except that such a representation is permissible if:

> **(a) (i) any personally prohibited lawyer takes reasonable steps to avoid exposure to confidential information other than information appropriate to determine whether to represent the prospective client, and (ii) such lawyer is screened as stated in § 124(2)(b) and (c); or**
>
> **(b) both the affected client and the prospective client give informed consent to the representation under the limitations and conditions provided in § 122.**

COMMENTS & ILLUSTRATIONS: Comment:

a. Scope and cross-references. This Section summarizes the duties of a lawyer to a person seeking legal services. Duties attach even when no client-lawyer relationship ensues. On application of the attorney-client privilege to communications with a prospective client, see § 72. Application of rules parallel to those of § 132(2) on former-client conflicts of interest and those of §§ 123-124 on imputation of conflicts is considered in Comment *c* hereto. Whether a

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Restatement of the Law, Third, The Law Governing Lawyers

Case Citations

Chapter 5 - Confidential Client Information

Topic 2 - The Attorney-Client Privilege

Title A - The Scope of the Privilege

Restat 3d of the Law Governing Lawyers, § 70

§ 70 Attorney--Client Privilege--"Privileged Persons"

Privileged persons within the meaning of § 68 are the client (including a prospective client), the client's lawyer, agents of either who facilitate communications between them, and agents of the lawyer who facilitate the representation.

COMMENTS & ILLUSTRATIONS: Comment:

a. Scope and cross-references. This Section addresses the requirement of § 68(2) that a confidential communication be "made between privileged persons." On determining which persons in a corporate or other organization qualify as agents for communication, see § 73, Comment *d*. On invoking the privilege, see § 86. See also § 75 (co-client communication) and § 76 (communication in common-interest arrangement).

b. A privileged person as the expressive source. To qualify as privileged, a communication must originate from a person who may make privileged communications and be addressed to persons who may receive them. Those persons are referred to in this Restatement as privileged persons. Client and lawyer are, of course, included. Other privileged persons are those who serve to facilitate communication between client and lawyer and persons who aid the lawyer in representing the client.

The privilege does not extend to communications from nonprivileged persons, even if the client transmits such a person's communication to the lawyer, for example by carrying to the lawyer a document written by a nonprivileged person. Such information may, however, be given a qualified immunity from discovery under the work-product immunity (see § 87). Moreover, if the communication from a nonprivileged person is incorporated in a protected communication from which it cannot be separated, the entire communication is privileged. For example, a lawyer may not be required to testify to what a client had communicated concerning the client's memory of a conversation with a nonprivileged third person.

c. An initial consultation. The privilege protects prospective clients--persons who communicate with a lawyer in an initial consultation but whom the lawyer does not thereafter represent--as well as persons with whom a client-lawyer

relationship is established (see § 72(1) & Comment *d* thereof; see also § 15).

d. Third-party payment of a fee. A person who pays a lawyer's fee is not necessarily a client. The relevant question is whether the lawyer undertook to give legal advice or provide other legal assistance to that person (see § 14; see also § 134).

e. Privileged agents for a client or lawyer: in general. The privilege normally applies to communications involving persons who on their own behalf seek legal assistance from a lawyer (see § 72). However, a client need not personally seek legal assistance, but may appoint a third person to do so as the client's agent (e.g., § 134, Comment *f*). Whether a third person is an agent of the client or lawyer or a nonprivileged "stranger" is critical in determining application of the attorney-client privilege. If the third person is an agent for the purpose of the privilege, communications through or in the presence of that person are privileged; if the third person is not an agent, then the communications are not in confidence (see § 71) and are not privileged. Accordingly, a lawyer should allow a nonclient to participate only upon clarifying that person's role and when it reasonably appears that the benefit of that person's presence offsets the risk of a later claim that the presence of a third person forfeited the privilege.

f. A client's agent for communication. A person is a confidential agent for communication if the person's participation is reasonably necessary to facilitate the client's communication with a lawyer or another privileged person and if the client reasonably believes that the person will hold the communication in confidence. Factors that may be relevant in determining whether a third person is an agent for communication include the customary relationship between the client and the asserted agent, the nature of the communication, and the client's need for the third person's presence to communicate effectively with the lawyer or to understand and act upon the lawyer's advice.

Illustrations:

1. The police arrest Client and do not permit Client to communicate directly with Client's regular legal counsel, Lawyer. Client asks Friend, a person whom Client trusts to keep information confidential, to convey to Lawyer the message that Lawyer should not permit the police to search Client's home. Friend is an agent for communication.

2. Client and Lawyer do not speak a language known by the other. Client uses Translator to communicate an otherwise privileged message to Lawyer. Translator is an acquaintance of Client. Translator is an agent for communication.

3. Client regularly employs Secretary to record and transcribe Client's important business letters, including confidential correspondence. Client uses the services of Secretary to prepare a letter to Lawyer. Secretary is an agent for communication.

An agent for communication need not take a direct part in client-lawyer communications, but may be present because of the Client's psychological or other need. A business person may be accompanied by a business associate or expert consultant who can assist the client in interpreting the legal situation.

Illustrations:

4. Client, 16 years old, is represented by Lawyer. Client's parents accompany Client at a meeting with Lawyer concerning a property interest of Client. Client's parents are appropriate agents for communication.

5. Client is advised by Accountant to consult a lawyer about a legal problem involving complex questions of tax accounting. Client, who does not fully understand the nature of the accounting questions, asks Accountant to accompany Client to a consultation with Lawyer so that Accountant can explain the nature of Client's legal matter to Lawyer. Accountant is Client's agent for communication. That would

ABA-AMRPC S 1.2
Ann. Mod. Rules Prof. Cond. s. 1.2

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RULES
CLIENT-LAWYER RELATIONSHIP

Rule 1.2 Scope of Representation and Allocation of Authority between Client and Lawyer

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(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

COMMENT

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such

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RULES OF SUPREME COURT OF VIRGINIA
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CLIENT-LAWYER RELATIONSHIP

Va. Sup. Ct. R. pt. 6, sec. II, 1.2 (2012)

Review Court Orders which may amend this Rule.

Rule 1.2. Scope of Representation

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (b), (c), and (d), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision, after consultation with the lawyer, whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer may limit the objectives of the representation if the client consents after consultation.

(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

(d) A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.

(e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

NOTES: *Scope of Representation*

[1] Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by the law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. In that context, a lawyer shall advise the client about the

advantages, disadvantages, and availability of dispute resolution processes that might be appropriate in pursuing these objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client/lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. These Rules do not define the lawyer's scope of authority in litigation.

[2-3] *ABA Model Rule* Comments not adopted.

[4] In a case in which the client appears to be suffering mental disability, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, a lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

Services Limited in Objectives or Means

[6] The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent.

[7] An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.

[8] *ABA Model Rule* Comment not adopted.

Criminal, Fraudulent and Prohibited Transactions

[9] A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted or required by Rule 1.6. However, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. A lawyer shall not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. See Rule 1.16.

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RULES OF SUPREME COURT OF VIRGINIA
PART SIX INTEGRATION OF THE STATE BAR
SECTION II. VIRGINIA RULES OF PROFESSIONAL CONDUCT
TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

Va. Sup. Ct. R. pt. 6, sec. II, 4.3 (2012)

Review Court Orders which may amend this Rule.

Rule 4.3. Dealing with Unrepresented Persons

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

(b) A lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interest of the client.

NOTES: [1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.

Virginia Code Comparison

Paragraph (a) is identical to DR 7-103(B) and paragraph (b) is similar to DR 7-103(A)(2).

Committee Commentary

The Virginia Code had deviated from the ABA Model Code by using the language of ABA Model Rule 4.3(a) as DR 7-103(B). This provision continues unchanged in Rule 4.3.

Complainant and respondent were co-tenants of real estate property. The respondent appeared pro se during a hearing before the commissioner in chancery, but then hired an attorney who appeared in a limited capacity at several other hearings. On appeal, the court sought to determine whether or not the attorney could appear in a limited capacity and whether the attorney's appearance qualified him as official "attorney of record". The court found that it was not bound by agreements made between client and attorney and that a court may "require more of an attorney than mere compliance with the ethical constraints of the Rules of Professional Conduct". The court found that the attorney could make a motion to withdraw once he completed the tasks agreed upon, but that the court had ultimate discretion in granting the withdrawal.

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RULES OF SUPREME COURT OF VIRGINIA
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PUBLIC SERVICE

Va. Sup. Ct. R. pt. 6, sec. II, 6.5 (2012)

Review Court Orders which may amend this Rule.

Rule 6.5. Nonprofit and Court-Annexed Limited Legal Services Programs

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

NOTES: [1] Legal services organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services -- such as advice or the completion of legal forms -- that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9 and 1.10.

[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(b). If a short-term limited representation would not be

reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

[3] Because a lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.

Virginia Code Comparison

This Rule had no counterpart in the Virginia Code.

Committee Commentary

The committee adopted this specific conflicts of interest rule in recognition of the distinctive nature of services provided in this context.

Effective date. -- This rule and the commentary thereto became effective January 1, 2004, by order adopted September 24, 2003.

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Chapter 2 - The Client-Lawyer Relationship

Topic 2 - Summary of the Duties Under a Client-Lawyer Relationship

Restat 3d of the Law Governing Lawyers, § 19

§ 19 Agreements Limiting Client or Lawyer Duties

(1) Subject to other requirements stated in this Restatement, a client and lawyer may agree to limit a duty that a lawyer would otherwise owe to the client if:

(a) the client is adequately informed and consents; and

(b) the terms of the limitation are reasonable in the circumstances.

(2) A lawyer may agree to waive a client's duty to pay or other duty owed to the lawyer.

COMMENTS & ILLUSTRATIONS: Comment:

a. Scope and cross-references. This Section describes the extent to which lawyers and clients may limit the duties to each other summarized in §§ 16 and 17. It addresses not waivers and settlements of claims that have already arisen (see § 54), but specifications defining in advance the duties of a lawyer or client. For additional requirements applicable to contracts reached during a representation, see § 18. This Section does not deal with duties that lawyers and clients may owe to third persons, except as they may be affected by changes in the duties of lawyers and clients to each other. See, e.g., §§ 51 and 56 (right of certain nonclients to sue lawyer for negligence). The Section assumes that the client is legally competent (see § 24). Concerning the waiver by a client of duties owed by a lawyer to the client, see § 19(1).

This Section provides default rules that apply when no other, more specific rule of the Restatement applies. Thus, its rules are subject to other provisions, such as those that concern allowing, restricting, or forbidding client consent to the disclosure of confidential information (e.g., §§ 26(3) & 62), waiver of conflicts of interest (e.g., §§ 122 & 126), and arbitration of fee disputes (see § 42). The Section should be applied in view of the prohibition against advance waiver by the client of the lawyer's civil liability (see § 54). The separation between the Sections is indistinct at the margins. Any accepted limitation might serve to diminish the lawyer's legal-malpractice liability notwithstanding § 54 and therefore might be motivated in part by the objective of obtaining such diminution. The reasonableness requirement of § 19(1)(b) serves to limit such diminutions to those in which the client obtains reasonably valuable services in the circumstances (see Comment *c* hereto).

b. Rationale. Restrictions on the power of a client to redefine a lawyer's duties are classified as paternalism by some and as necessary protection by others. On the one hand, for some clients the costs of more extensive services may outweigh their benefits. A client might reasonably choose to forgo some of the protection against conflicts of interest, for example, in order to get the help of an especially able or inexpensive lawyer or a lawyer already familiar to the client. The scope of a representation may properly change during a representation, and the lawyer may sometimes be obligated to bring changes of scope to a client's notice (see § 20). In some instances, such as an emergency, a restricted representation may be the only practical way to provide legal services (see Comments *c* and *d* hereto).

On the other hand, there are strong reasons for protecting those who entrust vital concerns and confidential information to lawyers (see § 16, Comment *b*). Clients inexperienced in such limitations may well have difficulty understanding important implications of limiting a lawyer's duty. Not every lawyer who will benefit from the limitation can be trusted to explain its costs and benefits fairly. Also, any attempt to assess the basis of a client's consent could force disclosure of the client's confidences. In the long run, moreover, a restriction could become a standard practice that constricts the rights of clients without compensating benefits. The administration of justice may suffer from distrust of the legal system that may result from such a practice. Those reasons support special scrutiny of noncustomary contracts limiting a lawyer's duties, particularly when the lawyer requests the limitation.

c. Limiting a representation. Clients and lawyers may define in reasonable ways the services a lawyer is to provide (see § 16), for example to handle a trial but not any appeal, counsel a client on the tax aspects of a transaction but not other aspects, or advise a client about a representation in which the primary role has been entrusted to another lawyer. Such arrangements are not waivers of a client's right to more extensive services but a definition of the services to be performed. They are therefore treated separately under many lawyer codes as contracts limiting the objectives of the representation. Clients ordinarily understand the implications and possible costs of such arrangements. The scope of many such representations requires no explanation or disclaimer of broader involvement.

Some contracts limiting the scope or objectives of a representation may harm the client, for example if a lawyer insists on agreement that a proposed suit will not include a substantial claim that reasonably should be joined. Section 19(1) hence qualifies the power of client and lawyer to limit the representation. Taken together with requirements stated in other Sections, five safeguards apply.

First, a client must be informed of any significant problems a limitation might entail, and the client must consent (see § 19(1)(a)). For example, if the lawyer is to provide only tax advice, the client must be aware that the transaction may pose non-tax issues as well as being informed of any disadvantages involved in dividing the representation among several lawyers (see also §§ 15 & 20).

Second, any contract limiting the representation is construed from the standpoint of a reasonable client (see § 18(2)).

Third, the fee charged by the lawyer must remain reasonable in view of the limited representation (see § 34).

Fourth, any change made an unreasonably long time after the representation begins must meet the more stringent tests of § 18(1) for postinception contracts or modifications.

Fifth, the terms of the limitation must in all events be reasonable in the circumstances (§ 19(1)(b)). When the client is sophisticated in such waivers, informed consent ordinarily permits the inference that the waiver is reasonable. For other clients, the requirement is met if, in addition to informed consent, the benefits supposedly obtained by the waiver--typically, a reduced legal fee or the ability to retain a particularly able lawyer--could reasonably be considered to outweigh the potential risk posed by the limitation. It is also relevant whether there were special circumstances warranting the limitation and whether it was the client or the lawyer who sought it. Also relevant is the choice available to clients; for example, if most local lawyers, but not lawyers in other communities, insist on the same limitation, client acceptance of the limitation is subject to special scrutiny.

The extent to which alternatives are constrained by circumstances might bear on reasonableness. For example, a client who seeks assistance on a matter on which the statute of limitations is about to run would not reasonably expect extensive investigation and research before the case must be filed. A lawyer may be asked to assist a client concerning an unfamiliar area because other counsel are unavailable. If the lawyer knows or should know that the lawyer lacks competence necessary for the representation, the lawyer must limit assistance to that which the lawyer believes reasonably necessary to deal with the situation.

Reasonableness also requires that limits on a lawyer's work agreed to by client and lawyer not infringe on legal rights of third persons or legal institutions. Hence, a contract limiting a lawyer's role during trial may require the tribunal's approval.

Illustrations:

1. Corporation wishes to hire Law Firm to litigate a substantial suit, proposing a litigation budget. Law Firm explains to Corporation's inside legal counsel that it can litigate the case within that budget but only by conducting limited discovery, which could materially lessen the likelihood of success. Corporation may waive its right to more thorough representation. Corporation will benefit by gaining representation by counsel of its choice at limited expense and could readily have bargained for more thorough and expensive representation.

2. A legal clinic offers for a small fee to have one of its lawyers (a tax specialist) conduct a half-hour review of a client's income-tax return, telling the client of the dangers or opportunities that the review reveals. The tax lawyer makes clear at the outset that the review may fail to find important tax matters and that clients can have a more complete consideration of their returns only if they arrange for a second appointment and agree to pay more. The arrangement is reasonable and permissible. The clients' consent is free and adequately informed, and clients gain the benefit of an inexpensive but expert tax review of a matter that otherwise might well receive no expert review at all.

3. Lawyer offers to provide tax-law advice for an hourly fee lower than most tax lawyers charge. Lawyer has little knowledge of tax law and asks Lawyer's occasional tax clients to agree to waive the requirement of reasonable competence. Such a waiver is invalid, even if clients benefit to some extent from the low price and consent freely and on the basis of adequate information. Moreover, allowing such general waivers would seriously undermine competence requirements essential for protection of the public, with little compensating gain. On prohibitions against limitations of a lawyer's liability, see § 54.

d. Lawyer waiver of a client's duties. Lawyers generally are well positioned to appraise a waiver of a client's duties to them (see § 17). Waiver of the client's duty to pay for legal services had traditionally been encouraged when motivated by the client's inability to pay. The client's duty to indemnify the lawyer for certain losses attributable to the client (see § 17(2)) is based on an implied contract which is subject to waiver. Client waivers do not diminish the duties owed to third persons, such as the duty not to commit or assist crime or fraud.

e. Contracts to increase a lawyer's duties. The general principles set forth in this Section apply also to contracts calling for more onerous obligations on the lawyer's part. A lawyer or law firm might, for example, properly agree to provide the services of a tax expert, to make an unusually large number of lawyers available for a case, or to take unusual precautions to protect the confidentiality of papers. Such a contract may not infringe the rights of others, for example by binding a lawyer to aid an unlawful act (see § 23) or to use for one client another client's secrets in a manner forbidden by § 62. Nor could the contract contravene public policy, for example by forbidding a lawyer ever to represent a category of plaintiffs even were there no valid conflict-of-interest bar (see § 13) or by forbidding the lawyer to speak on matters of public concern whenever the client disapproves.

Clients too may sometimes agree to special obligations, for example to contribute work to a case, as by conducting

witness interviews.

REPORTERS NOTES: REPORTER'S NOTE

Comment c. Limiting a representation. See generally ABA Model Rules of Professional Conduct, Rule 1.2(c) (1983) ("A lawyer may limit the objectives of the representation if the client consents after consultation."); Zacharias, Limited Performance Agreements: Should Clients Get What They Pay For?, 11 Geo. J. Leg. Ethics 915 (1998); e.g., *Kane, Kane & Kritzer, Inc. v. Altagen, 165 Cal.Rptr. 534 (Cal.Ct.App.1980)* (lawyer retained by sophisticated client to send collection letters, but not to file or discuss suit unless requested); *Johnson v. Jones, 652 P.2d 650 (Idaho 1982)* (to draw up contract but not to advise on rights under it); *Delta Equipment & Constr. Co. v. Royal Indem. Co., 186 So.2d 454 (La.Ct.App.1966)* (to defend workers-compensation claim but not wage claim); *Martini v. Leland, 455 N.Y.S.2d 354 (N.Y.Civ.Ct.1982)* (to consult on pending suit but not conduct the litigation); *Greenwich v. Markhoff, 650 N.Y.S.2d 704 (N.Y.App.Div.1996)* (to bring worker-compensation claims; lawyer liable for not informing client of possible negligence claim). For regulations prohibiting certain limited tax-shelter opinions, see Treasury Dept. Circular No. 230, 31 C.F.R. § 10.33; C. Wolfram, Modern Legal Ethics 700-01 (1986).

On limited representation in an emergency, see, e.g., ABA Model Rules of Professional Conduct, Rule 1.1, Comment P [3] (1983) ("In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill considered action under emergency conditions can jeopardize the client's interest"); Tex. Discipl. R. Prof. Conduct, R. 1.01(a)(2) (lawyer may accept or continue representation in matter which lawyer knows is beyond lawyer's competence "in an emergency and the lawyer limits the advice and assistance to that which is reasonably necessary in the circumstances").

On limitation of lawyer duties, see, e.g., *United States v. Roth, 860 F.2d 1382 (7th Cir.1988)*, cert. denied, *490 U.S. 1080, 109 S.Ct. 2099, 104 L.Ed.2d 661 (1989)* (criminal defendant who was a lawyer agreed, inter alia, that expert defense counsel would not engage in plea bargaining, in order to avoid conflicts of interest); *City of Cleveland v. Cleveland Elec. Illuminating Co., 440 F.Supp. 193 (N.D.Ohio 1976)* (city agreed that firm would help it in issuing bonds without ceasing to represent corporation in adversarial dealings with city), aff'd, *573 F.2d 1310 (6th Cir.1977)*, cert. denied, *435 U.S. 996, 98 S.Ct. 1648, 56 L.Ed.2d 85 (1978); Griffith v. Taylor, 937 P.2d 297 (Alaska 1997)* (agreement that lawyer would perform only "scrivener" function of pre-paring quit-claim deed based entirely on statutory form); *Maxwell v. Superior Court, 639 P.2d 248 (Cal.1982)* (criminal defendant agreed that lawyer could write book about case); *In re Harris, 514 N.E.2d 462 (Ill.1987)* (client who could not find other counsel agreed that lawyer could take long time recovering escheated funds). On the procedural requirements for such waivers, see, e.g., *Unified Sewerage Agency v. Jelco Inc., 646 F.2d 1339 (9th Cir.1981)* (consent upheld when client discussed question with inside legal counsel); *IBM Corp. v. Levin, 579 F.2d 271 (3d Cir.1978)* (consent inadequate when conflict cursorily mentioned to inside legal counsel, even though other inside legal counsel knew of conflicting case); *Dunton v. County of Suffolk, 729 F.2d 903 (2d Cir.1984)* (cursory disclosure of conflict inadequate); *Maxwell v. Superior Court, supra* (consent of criminal defendant to publication-rights contract adequate when contract contained detailed waiver provisions and judge questioned defendant in court). Much of the case law concerns conflicts of interest. See § 122, Reporter's Note.

Comment d. Lawyer waiver of a client's duties. See § 38, Comment *c*, and Reporter's Note thereto.

Comment e. Contracts to increase a lawyer's duties. See *Spivack, Shul-man & Goldman v. Foremost Liquor Store, Inc., 465 N.E.2d 500 (Ill.App.Ct.1984)* (lawyer who "guarantees" result of litigation liable if negligent in reaching that conclusion); 1 R. Mallen & J. Smith, Legal Malpractice § 15.4 (3d ed. 1989) (higher standard of care for lawyers claiming to be specialists). On restrictions on accepting clients that are unenforceable because in conflict with public policy, see, e.g., ABA Formal Opin. 94-381 (1994) (in view of ABA Model Rules of Professional Conduct, Rule 5.6(a) (1983), inside corporate counsel may not seek and outside lawyer may not give promise conditioning representation of

corporation on undertaking never to represent anyone against corporation in future).

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Chapter 3 - Client and Lawyer: The Financial and Property Relationship

Topic 4 - Property and Documents of Clients and Others

Restat 3d of the Law Governing Lawyers, § 46

§ 46 Documents Relating to a Representation

(1) A lawyer must take reasonable steps to safeguard documents in the lawyer's possession relating to the representation of a client or former client.

(2) On request, a lawyer must allow a client or former client to inspect and copy any document possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse.

(3) Unless a client or former client consents to non-delivery or substantial grounds exist for refusing to make delivery, a lawyer must deliver to the client or former client, at an appropriate time and in any event promptly after the representation ends, such originals and copies of other documents possessed by the lawyer relating to the representation as the client or former client reasonably needs.

(4) Notwithstanding Subsections (2) and (3), a lawyer may decline to deliver to a client or former client an original or copy of any document under circumstances permitted by § 43(1).

COMMENTS & ILLUSTRATIONS: Comment:

a. Scope and cross-references. For purposes of this Section, a document includes a writing, drawing, graph, chart, photograph, phono-record, tape, disc, or other form of data compilation. The Section does not embrace writings that qualify as property under §§ 44 and 45 because of their value, for example cash, negotiable instruments, stock certificates and other writings constituting presumptive proof of title, and collectors' items such as literary manuscripts. With respect to a lawyer's duty to safeguard the contents of documents containing confidential client information, see generally Chapter 5.

b. A lawyer's duty to safeguard documents. The duty recognized by § 46(1) is similar to the duty to safeguard property recognized in § 44. Usually a lawyer must maintain an orderly filing system, with each client's documents separated and with reasonable measures to limit access to authorized firm personnel. With regard to a lawyer's duty to supervise firm employees, see § 11.

A lawyer's duty to safeguard client documents does not end with the representation (see § 33). It continues while

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Chapter 4 - Lawyer Civil Liability

Topic 1 - Liability for Professional Negligence and Breach of Fiduciary Duty

Restat 3d of the Law Governing Lawyers, § 50

§ 50 Duty of Care to a Client

For purposes of liability under § 48, a lawyer owes a client the duty to exercise care within the meaning of § 52 in pursuing the client's lawful objectives in matters covered by the representation.

COMMENTS & ILLUSTRATIONS: Comment:

a. Scope and cross-references. This Section sets forth a lawyer's duty of care to a client. Duties to certain nonclients are set forth in § 51. The care required by these various duties is described in § 52, and subsequent Sections consider when damages caused by breach of duty may be recovered (see § 53) and what defenses are available (see § 54). On recovery for a lawyer's breach of fiduciary duty to a client, in which similar concepts may apply, see § 49. On a client's recovery for a lawyer's acts taken without authority, see § 27, Comment *f*. On other claims of a client against a lawyer, see § 56. On a client's obligations to a lawyer, see § 17. On the use of confidential client information by a lawyer defending against a former client's malpractice claim, see §§ 64 and 80.

The duties described in this and the following Section are duties within the meaning of tort law; that is, they denote the fact that the actor is required to act in a particular manner at the risk that otherwise the actor "becomes subject to liability to another to whom the duty is owed for any injury sustained by that other, of which that actor's conduct is a legal cause" (*Restatement Second, Torts § 4*). Whether a duty in this sense exists is not necessarily the same issue as whether there exists a duty enforceable by disciplinary sanctions or other remedies (see § 16 (summarizing a lawyer's duties to a client); § 52, Comment *f*).

b. Rationale. Among the grounds warranting recognition of a duty owed by a lawyer to a client are the lawyer's undertaking to perform services for the client, the client's foreseeable reliance on that undertaking, and the social interest in fulfillment of the undertaking (cf. *Restatement Second, Torts § 323* (duty of one undertaking to render services)). The provision of a civil remedy is also important because the lawyer owes special obligations to a client and because the proper functioning of the legal system depends on competent legal representation (see § 16, Comment *b*).

c. Clients and former clients. Section 14 sets forth the circumstances in which a client-lawyer relationship arises. As there stated, the manifested consent of both parties is ordinarily required for the relationship to exist, except that the lawyer's consent is not required when a tribunal appoints the lawyer to represent the client or in certain instances of

reasonable reliance by the client on the lawyer (see § 14(1)(a) & (b) & § 14(2)). For duties owed by a lawyer to a prospective client who does not become a client, see § 15, Comment *e*, and § 51(1). The client's claim may be asserted by a receiver, trustee in bankruptcy, or other person who has succeeded to the client's interest. The general law of the jurisdiction determines whether and how a claim may be transferred by succession, assignment, subrogation, or otherwise, as well as such questions as the survival of defenses.

After a client-lawyer relationship ends (see § 31), a lawyer's duties to the former client drastically decrease (see § 33, Comment *h*). Yet a lawyer still owes certain duties to a former client, for example, to surrender papers and property to which the client is entitled (see § 33(1)), protect client confidences (see § 60), and avoid certain conflicts of interest (see §§ 132-133). Breach of such duties, which are summarized in § 33, may be remedied through a malpractice action in circumstances coming within this Section. Of course, a former client may also bring a malpractice action, subject to the applicable statute of limitations, to recover for a lawyer's breaches of duty during the relationship. On whether a client-lawyer relationship is a continuing one, see § 31, Comment *h*.

d. Client objectives. A lawyer must exercise care in pursuit of the client's lawful objectives in matters within the scope of the representation. The lawyer is not liable for failing to act beyond that scope (see § 16, Comment *c*). On agreements defining and limiting the scope of the representation, see § 19(1). The client's objectives are to be defined by the client after consultation (see § 16(1)), so the lawyer must appropriately inform and consult with the client (see § 20). A lawyer ordinarily has considerable leeway in choosing among alternative means of pursuing the client's objectives; within limits (see §§ 22-23) the client and lawyer may expand or contract that leeway by agreement or client instructions (see § 21). (On clients with diminished capacity, see § 24.) A lawyer who negligently fails to pursue the lawful objectives properly specified by the client, disregards proper client instructions, fails to inform and consult appropriately, or acts without authority (see § 27, Comment *f*) is subject to liability to the client for damages thereby caused (see *Restatement Second, Agency §§ 381*, 383, 385, & 401).

e. Lawful objectives. A lawyer may not pursue a client objective or take or assist any act when the lawyer knows that the objective or act is prohibited by law, and the lawyer may decline to pursue objectives or to take or assist acts that the lawyer reasonably believes to be so prohibited (see §§ 23(1) & 94). A lawyer is hence not subject to liability to a client for malpractice for failing to pursue objectives or to take or assist acts that the lawyer reasonably believes to be prohibited by law (including professional rules) (see § 54(1)). Similarly, a lawyer is not subject to liability to a client for performing an act the lawyer reasonably believes to be required by law, even though it impedes the client's objectives. For example, if a lawyer has raised all nonfrivolous objections to discovery of a document in the lawyer's custody but the court has ordered discovery, the lawyer is not subject to malpractice liability for complying with the discovery order, even though the client wishes the lawyer to commit contempt of court by violating the order. The same principles also protect a lawyer from liability to nonclients (see § 51).

When a lawyer reasonably believes that an act or objective is immoral or violates professional courtesy, even if not unlawful, the lawyer may assume that the client would not want that act or objective to be pursued. The lawyer may also: urge a client to refrain from pursuing the act or objective (see § 94(3) & Comment *h* thereto); decline to accept the representation unless the client abandons the act or objective or agrees that the lawyer will not be obliged to perform such acts (see § 21); take morality and professional courtesy into account in making decisions reserved to the lawyer (see § 23); refuse to follow the client's instructions in the circumstances stated in § 21, Comment *e*; and withdraw from the representation in the circumstances stated in § 32(3)(e). None of those courses of conduct violates the duties described in this Section. However, a lawyer must, when it is reasonably feasible, give the client notice of the refusal to pursue an act or objective that the client has requested or directed.

REPORTERS NOTES: REPORTER'S NOTE

Comment c. Clients and former clients. On the duty owed to clients, see § 52, Reporter's Note. On prospective clients, see § 15, Comment *e*, and Reporter's Note thereto. For assertion of a client's claim by a receiver or trustee in bankruptcy or similar successor in interest, see, e.g., *Stumpf v. Albracht, 982 F.2d 275 (8th Cir.1992); FDIC v. Clark,*

978 F.2d 1541 (10th Cir.1992); FDIC v. Mmahat, 907 F.2d 546 (5th Cir.1990), cert. denied, *499 U.S. 936, 111 S.Ct. 1387, 113 L.Ed.2d 444 (1991); FDIC v. O'Melveny & Meyers, 969 F.2d 744 (9th Cir.1992),* rev'd on other grounds, *512 U.S. 79, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994); Gunn v. Mahoney, 408 N.Y.S.2d 896 (N.Y.Sup.Ct. 1978).* On an insurer's right to assert a malpractice claim against a lawyer it designated to defend a suit against an insured, whether by subrogation to the insured's claim or otherwise, see § 51, Comment *f,* and Reporter's Note thereto. On the assignability of malpractice claims, compare, e.g., *Can Do, Inc. Pension & Profit Sharing Plan v. Manier, Herod, Hollabaugh & Smith, 922 S.W.2d 865* (Tenn.), cert. denied, *519 U.S. 929, 117 S.Ct. 298, 136 L.Ed.2d 216 (1996)* (assignment violates public policy), with, e.g., *New Hampshire Ins. Co. v. McCann, 707 N.E.2d 332 (Mass.1999)* (rejecting arguments against assignability); *Hedlund Mfg. Co. v. Weiser, Stapler & Spivak, 539 A.2d 357 (Pa. 1988)* (upholding assignment). See generally 1 R. Mallen & J. Smith, Legal Malpractice §§ 7.10-7.11 (4th ed.1996).

On former clients, compare *Barry v. Ashley Anderson, P.C., 718 F.Supp. 1492 (D.Colo.1989)* (lawyer who did not withdraw appearance not liable for dismissal of client's action, when at client's request case file had been transferred to new lawyer, and lawyer notified new lawyer of impending dismissal); *Frazier v. Effman, 501 So.2d 114 (Fla.Dist.Ct.App. 1987)* (lawyer not liable for failure to join defendant before statute of limitations expired when client had discharged and replaced lawyer months before expiration); *Williams v. Consolvo, 379 S.E.2d 333 (Va.1989)* (lawyer not liable for failing to advise client not to pay claim, when client paid only after retaining new lawyer), with *Damron v. Herzog, 67 F.3d 211 (9th Cir.1995),* cert. denied, *516 U.S. 1117, 116 S.Ct. 922, 133 L.Ed.2d 851 (1996)* (lawyer liable for accepting substantially related matter adverse to former client); *Hanlin v. Mitchelson, 794 F.2d 834 (2d Cir.1986)* (lawyer who neither took action to protect client nor notified client of withdrawal liable to client); *Nolan v. Foreman, 665 F.2d 738 (5th Cir.1982)* (liability for failing to return client documents after representation ended); *Lama Holding Co. v. Shearman & Sterling, 758 F.Supp. 159 (S.D.N.Y.1991)* (duty owed if partner told former client firm would inform of significant taxlaw changes); *David Welch Co. v. Erskine & Tulley, 250 Cal.Rptr. 339 (Cal.Ct.App.1988)* (liability for misuse of confidential information after representation ended); Central Cab Co. v. *Clarke, 270* A.2d 662 (Md. 1970) (similar to *Hanlin v. Mitchelson, supra).*

Comment d. Client objectives. For cases finding liability appropriate, see *Arana v. Koerner, 735 S.W.2d 729 (Mo.Ct.App.1987)* (lawyer settled medical-malpractice suit brought against client despite client's direction to defend case); *S & D Petroleum Co. v. Tamsett, 534 N.Y.S.2d 800 (N.Y.App.Div.1988)* (lawyer failed to file security agreement); *Logalbo v. Plishkin, Rubano & Baum, 558 N.Y.S.2d 185 (N.Y.App.Div.1990)* (client asked lawyer to cancel contract; lawyer gave oral notice of cancellation, but not timely written notice required by contract); *Olson v. Fraase, 421 N.W.2d 820 (N.D.1988)* (client asked lawyer to place property in joint tenancy with client's spouse, which lawyer failed to do before client's death); *Pizel v. Zuspann, 795 P.2d 42* (Kan.), modified on denial of rehearing *803 P.2d 205 (Kan.1990)* (lawyer liable for failing to put trust into proper operation); § 20, Reporter's Note (failure to inform or consult); § 21, Comment *d,* and Reporter's Note thereto (failure to follow instructions); § 27, Comment *f,* and Reporter's Note thereto (acting without authority).

The lawyer's duty is limited by the scope of the representation. E.g., *McLaughlin v. Sullivan, 461 A.2d 123 (N.H.1983)* (lawyer retained to defend criminal proceeding has no duty to use care to avoid client's suicide); *Prudential Ins. Co. v. Dewey, Ballantine, Bushby, Palmer & Wood, 605 N.E.2d 318 (N.Y.1992)* (lawyer giving nonclient opinion letter that mortgage documents represented binding obligation not liable for misstatement of amount of mortgage); *Pittsburgh Coal & Coke, Inc. v. Cuteri, 590 A.2d 790 (Pa.Super.Ct.1991)* (lawyer retained for "lien search" not liable for failure to find nonlien flaw in title), rev'd on other grounds, *622 A.2d 284 (Pa.1993);* § 19, Comment *c,* and Reporter's Note thereto.

Comment e. Lawful objectives. See *Transcraft, Inc. v. Galvin, Stalmack, Kirschner & Clark, 39 F.3d 812 (7th Cir.1994),* cert. denied, *514 U.S. 1123, 115 S.Ct. 1990, 131 L.Ed.2d 876 (1995)* (lawyer not liable for failing to throw sand in jury's eyes); *Kirsch v. Duryea, 578 P.2d 935 (Cal.1978)* (lawyer not liable for withdrawing from case that lawyer reasonably believed to lack merit); *Mills v. Cooter, 647 A.2d 1118 (D.C.1994)* (lawyer not liable for declining, after notice to client, to join party as defendant where lawyer reasonably believed claim was baseless and rule required lawyer to certify that pleading was well grounded); *In re Marriage of Betts, 558 N.E.2d 404 (Ill.App.Ct. 1990),* cert.

denied, *567 N.E.2d 328 (Ill.1991)* (dicta) (lawyer not subject to malpractice suit for performing an act required by court order); *Competitive Food Systems, Inc. v. Laser, 524 N.E.2d 207 (Ill.App.Ct.1988)* (lawyer sued for failing to produce offering circular on time may defend by showing circular would have been unlawful because of misleading financial projections furnished to lawyer); *Harris v. Maready, 353 S.E.2d 656 (N.C.Ct. App.1987)* (lawyer not liable for declining to bring suit lawyer considers abuse of process); §§ 23 and 94, Reporter's Notes; cf. *Parksville Mobile Modular, Inc. v. Fabricant, 422 N.Y.S.2d 710 (N.Y.App.Div.1979)* (dicta) (lawyer can be liable to client for recommending evasion of injunction).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewGovernmentsFiduciary ResponsibilitiesTortsIntentional TortsBreach of Fiduciary DutyGeneral Overview

1 of 1 DOCUMENT

Restatement of the Law, Third, The Law Governing Lawyers

Case Citations

Chapter 4 - Lawyer Civil Liability

Topic 1 - Liability for Professional Negligence and Breach of Fiduciary Duty

Restat 3d of the Law Governing Lawyers, § 51

§ 51 Duty of Care to Certain Nonclients

For purposes of liability under § 48, a lawyer owes a duty to use care within the meaning of § 52 in each of the following circumstances:

(1) to a prospective client, as stated in § 15;

(2) to a nonclient when and to the extent that:

(a) the lawyer or (with the lawyer's acquiescence) the lawyer's client invites the nonclient to rely on the lawyer's opinion or provision of other legal services, and the nonclient so relies; and

(b) the nonclient is not, under applicable tort law, too remote from the lawyer to be entitled to protection;

(3) to a nonclient when and to the extent that:

(a) the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the nonclient;

(b) such a duty would not significantly impair the lawyer's performance of obligations to the client; and

(c) the absence of such a duty would make enforcement of those obligations to the client unlikely; and

(4) to a nonclient when and to the extent that:

(a) the lawyer's client is a trustee, guardian, executor, or fiduciary acting primarily to perform similar functions for the nonclient;

(b) the lawyer knows that appropriate action by the lawyer is necessary with respect to a matter within the scope of the representation to prevent or rectify the breach of a fiduciary duty owed by the client to the nonclient, where (i) the breach is a crime or fraud or (ii) the lawyer has assisted or is assisting the breach;

(c) the nonclient is not reasonably able to protect its rights; and

(d) such a duty would not significantly impair the performance of the lawyer's obligations to the client.

COMMENTS & ILLUSTRATIONS: Comment:

a. Scope and cross-references. This Section sets forth the limited circumstances in which a lawyer owes a duty of care to a nonclient. Compare § 14, describing when one becomes a client, and § 50, which sets forth a lawyer's duty to a client. On the meaning of the term "duty," see § 50, Comment *a*. Even when a duty exists, a lawyer is liable for negligence only if the lawyer violates the duty (see § 52), the violation is the legal cause of damages (see § 53), and no defense is established (see § 54).

As stated in § 54(1), a lawyer is not liable under this Section for any action or inaction the lawyer reasonably believed to be required by law, including a professional rule. As stated in §§ 66(3) and 67(4), a lawyer who takes action or decides not to take action permitted under those Sections is not, solely by reason of such action or inaction, liable for damages.

In appropriate circumstances, a lawyer is also subject to liability to a nonclient on grounds other than negligence (see §§ 48 & 56), for litigation sanctions (see § 110), and for acting without authority (see § 30). On indemnity and contribution, see § 53, Comment *i*. This Section does not consider those liabilities, such as liabilities arising under securities or similar legislation. Nor does the Section consider when a lawyer found liable to a nonclient may recover from a client under such theories as indemnity, contribution, or subrogation. On a client's liability to a nonclient arising out of a lawyer's conduct, see § 26, Comment *d*.

b. Rationale. Lawyers regularly act in disputes and transactions involving nonclients who will foreseeably be harmed by inappropriate acts of the lawyers. Holding lawyers liable for such harm is sometimes warranted. Yet it is often difficult to distinguish between harm resulting from inappropriate lawyer conduct on the one hand and, on the other hand, detriment to a nonclient resulting from a lawyer's fulfilling the proper function of helping a client through lawful means. Making lawyers liable to nonclients, moreover, could tend to discourage lawyers from vigorous representation. Hence, a duty of care to nonclients arises only in the limited circumstances described in the Section. Such a duty must be applied in light of those conflicting concerns.

c. Opposing parties. A lawyer representing a party in litigation has no duty of care to the opposing party under this Section, and hence no liability for lack of care, except in unusual situations such as when a litigant is provided an opinion letter from opposing counsel as part of a settlement (see Subsection (2) and Comment *e* hereto). Imposing such a duty could discourage vigorous representation of the lawyer's own client through fear of liability to the opponent. Moreover, the opposing party is protected by the rules and procedures of the adversary system and, usually, by counsel. In some circumstances, a lawyer's negligence will entitle an opposing party to relief other than damages, such as vacating a settlement induced by negligent misrepresentation. For a lawyer's liability to sanctions, which may include payments to an opposing party, based on certain litigation misconduct, see § 110. See also § 56, on liability for intentional torts.

Similarly, a lawyer representing a client in an arm's-length business transaction does not owe a duty of care to opposing nonclients, except in the exceptional circumstances described in this Section. On liability for aiding a client's unlawful conduct, see § 56.

Illustration:

1. Lawyer represents Plaintiff in a personal-injury action against Defendant. Because Lawyer fails to conduct an appropriate factual investigation, Lawyer includes a groundless claim in the complaint. Defendant incurs legal expenses in obtaining dismissal of this claim. Lawyer is not liable for negligence

LEGAL ETHICS OPINION 1761

PROVIDING FORMS TO *PRO SE* LITIGANTS

You have presented a hypothetical situation concerning a Legal Services office whose office is near a General District Court. Many *pro se* litigants who are not eligible for representation by the Legal Services office make inquiries to that office and requests forms.

Under the facts you have presented, you have asked the committee to opine as to whether attorneys with the Legal Services office may ethically provide forms to *pro se* litigants not represented by Legal Services, and to whom no legal advice would be given.

The appropriate and controlling disciplinary rules relative to your inquiry are Rules 3.4(d) and 8.4(c):

> RULE 3.4 Fairness To Opposing Party And Counsel
>
> A lawyer shall not:
>
> (d) Knowingly disobey or advise a client to disregard a standing rule or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take steps, in good faith, to test the validity of such rule or ruling.
>
> RULE 8.4 Misconduct
>
> It is professional misconduct for a lawyer to:
>
> (c) engage in professional conduct involving dishonesty, fraud, deceit or misrepresentation

In LEO #1592, the committee opined that where a court requires that all drafters of pleadings disclose their identity as such to the court, it may violate former DR 7-105(A)'s prohibition against violating, or directing a client to violate, a rule of court as well as former DR 1-102(A)(4)'s prohibition against misrepresentation. The committee notes that the text of those rules now appears in current rules 3.4(d) and 8.4(c), respectively. In LEO #1592, attorneys were drafting the pleadings for *pro se* litigants. In contrast, the members of your staff will merely be providing blank forms. This distinction was made by the Unauthorized Practice of Law Committee of the Virginia State Bar in determining that mere provision of forms is not the practice of law, whereas the completion of those forms would be. *See* UPL Op. 73. Using that same distinction, this committee opines that it would not be "ghost-writing" requiring disclosure to the court, as contemplated in LEO #1592, for members of a legal aid staff to provide various legal forms to *pro se* litigants, so long as no assistance is provided in the completion of those forms. Provision of the forms, alone, does not violate Rules 3.4(d) and 8.4(c).

This opinion is advisory only, based only on the facts you presented and not binding on any court or tribunal.

Committee Opinion
January 6, 2002

American Bar Association
Annotated Model Rules of Professional Conduct, Seventh Edition
2011

RULES
COUNSELOR

Rule 2.1 Advisor

Ellen J. Bennett
Elizabeth J. Cohen
Martin Whittaker
Center for Professional Responsibility

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Comment

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would

1 of 1 DOCUMENT

Code of Virginia

*** Rules Amendments received by the Publisher from Virginia Supreme Court through November 1, 2012. ***
*** Remaining Rules current through October 5, 2012.***
*** Annotations current for Cases Received by October 13, 2012. ***

RULES OF SUPREME COURT OF VIRGINIA
PART SIX INTEGRATION OF THE STATE BAR
SECTION II. VIRGINIA RULES OF PROFESSIONAL CONDUCT
COUNSELOR AND THIRD-PARTY NEUTRAL

Va. Sup. Ct. R. pt. 6, sec. II, 2.1 (2012)

Review Court Orders which may amend this Rule.

Rule 2.1. Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

NOTES: *Scope of Advice*

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It could also ignore, to the client's disadvantage, the relational or emotional factors driving a dispute. In such a case, advice may include the advantages, disadvantages and availability of other dispute resolution processes that might be appropriate under the circumstances.

[2a] It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client

inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal, moral or ethical consequences to the client or to others, duty to the client under Rule 1.4 may require that the lawyer act if the client's course of action is related to the representation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

Virginia Code Comparison

There was no direct counterpart to this Rule in the Disciplinary Rules of the Virginia Code. DR 5-106(B) provided that a lawyer "shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services." EC 7-8 stated that "[a]dvice of a lawyer to his client need not be confined to purely legal considerations... In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible... In the final analysis, however, ... the decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately for the client...."

Committee Commentary

The Committee adopted the ABA Model Rule verbatim because it sets forth more clearly than the Disciplinary Rules the scope of a lawyer's advisory role.

CASE NOTES

Failure to advise against filing bankruptcy. -- Where the grandmother and father of an 18-year-old Chapter 13 debtor used the debtor as part of a scheme to hinder, delay, and defraud their own creditors, the attorney for the debtor, who had represented the grandmother and father in prior bankruptcy cases, was a willing and active participant in the scheme, in violation of *Fed. R. Bankr. P. 9011* and several rules of the Virginia Rules of Professional Conduct, including Va. Sup. Ct. R. pt. 6, § II, R. 2.1. *In re Johnson, 2008 Bankr. LEXIS 164* (Bankr. E.D. Va. Jan. 18, 2008).

Laremont-Lopez v. Southeastern Tidewater Opportunity Ctr., 968 F.Supp. 1075 (E.D. Va. 1997)

Over a period of time, pro se plaintiffs submitted pleadings that had been written by attorneys pursuant to discrete-task representation contracts. The attorneys did not sign the pleadings, and in most cases did not appear as counsel of record. When ordered to show cause by the court as to why they should not be held in contempt of court, attorneys argued that the professional relationships created with the litigants ended once they had drafted the pleadings. Court held that there was insufficient evidence to show that the attorneys knowingly misled the court or intentionally violated ethical or procedural rules and declined to impose sanctions. However, court stated that the practice of ghostwriting pleadings without acknowledging authorship and without asking court approval to withdraw from representation was inconsistent with Fed. R. Civ. P. 11 and Rule 83.1(G) of the Local Rules for the United States District Court for the Eastern District of Virginia. Court stated that allowing attorneys to ghostwrite pleadings for pro se plaintiffs abused additional leeway given to pro se filings.

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CAROLYN J. WALKER v. AMERICAN ASSOCIATION OF PROFESSIONAL EYE CARE SPECIALISTS, P.C., d/b/a AAPECS, ET AL.

Record No. 031844

SUPREME COURT OF VIRGINIA

268 Va. 117*; *597 S.E.2d 47*; *2004 Va. LEXIS 91

June 10, 2004, Decided

PRIOR HISTORY: [***1] FROM THE CIRCUIT COURT OF THE CITY OF NORFOLK. Charles D. Griffith, Jr., Judge.
Walker v. Am. Ass'n of Prof'l Eye Care Specialists, P.C., 2003 Va. Cir. LEXIS 137, 61 Va. Cir. 487 (2003)

DISPOSITION: Reversed and remanded.

COUNSEL: *Steven P. Letourneau* (*John D. Hooker & Associates*, on brief), for appellant.

David L. Littel (*John Franklin, III*; *Brian N. Casey*; *Taylor & Walker*, on brief), for appellees.

Amicus Curiae: Virginia State Bar (Jean P. Dahnk; Thomas A. Edmonds; James M. McCauley, on brief), in support of appellant.

JUDGES: OPINION BY JUSTICE DONALD W. LEMONS.

OPINION BY: DONALD W. LEMONS

OPINION

[**47] [*119] Present: All the Justices

In this appeal, we consider whether an attorney who delivers a pleading, signed by a pro se plaintiff, on behalf of the plaintiff is, by that action, "counsel of record." We further consider whether the pleading in this case is invalid.

I. Facts and Proceedings Below

The material facts of this case are not in dispute. On December 13, 2001, Carolyn J. Walker ("Walker"), caused a motion for judgment to be filed in the Circuit Court for the City of Norfolk alleging negligent medical treatment by American Association of Professional Eye Care Specialists, P.C. and two [**48] of its agents (collectively, "AAPECS"). Walker signed her name to the motion for judgment. According to testimony in proceedings before the trial court, attorney Robert S. Cohen ("Cohen") arranged for delivery of the motion to the trial court because Walker "didn't know where the courthouse was." Along with Walker's motion for judgment, Cohen sent a cover letter indicating that the motion for judgment was to be filed on behalf of Walker. A check drawn [***2] on Cohen's client trust account in the amount of the filing fees was also enclosed. Cohen did not expressly state in the cover letter that he was making an appearance on behalf of Walker.

Walker initially engaged Cohen in early 2001 to "investigate whether or not she had a potential case" against AAPECS. She placed $ 1500 in an escrow account with Cohen. On July 3, 2001, Cohen informed Walker that he would not represent her in the case and

that "if she wished to go forward with it, that she'd have to file a suit either in her name or get another attorney to do so." While a different attorney drafted the motion for judgment for Walker, she asked Cohen to help her find a medical expert for a fixed fee of $ 500, which he did. Both the fee for finding an expert and the court filing fees were drawn from Walker's funds in escrow with Cohen. The residue was transferred to the attorney who eventually agreed to represent Walker. Both Cohen and Walker agreed in their testimony that at the time the motion for judgment was filed, Cohen was not Walker's attorney and Walker understood that Cohen was not her attorney.

AAPECS filed a motion to strike and a motion to quash arguing that Walker's pleading [***3] was improperly signed because Cohen represented her at the time the pleading was filed. The trial court held two hearings on the matter. At the second hearing, the trial court received [*120] testimony from both Walker and Cohen. In an order and opinion, the trial court granted AAPECS' motions, concluding that Cohen was Walker's counsel of record and that Walker's pleading had been improperly signed by her under *Rules 1:4* and *1A:4*. The trial court dismissed the action with prejudice. Walker appeals the adverse judgment of the trial court.

II. Analysis

The dispositive issue in this case is whether Cohen was counsel of record for Walker when the motion for judgment was filed. AAPECS argues that the trial court made a finding of fact that Walker was not conducting her own case. The trial court stated, at the conclusion of its first hearing on the matter, that "I am giving you that factual conclusion that Mr. Cohen made an appearance in the case. He was counsel of record when he filed that motion for judgment." However, the conclusion that Cohen made an appearance or was counsel of record is a mixed question of law and fact. We must consider the facts which are essentially undisputed and then [***4] determine whether, as a matter of law, Cohen was counsel of record when the motion for judgment was filed. Consequently, we review the trial court's judgment *de novo. Caplan v. Bogard, 264 Va. 219, 225, 563 S.E. 2d 719, 722 (2002).*

Walker maintains that the trial court erred in its holding that Cohen was counsel of record in the case as a matter of fact. We hold that as a matter of law, Cohen was not counsel of record. Additionally, Walker assigns error to the trial court's holding that *Rule 1A:4* applies to her case and required Cohen to sign the motion for judgment. Walker further asserts that the trial court's misinterpretation of the applicability of *Rule 1A:4* resulted in its conclusion that the pleading was invalid. We agree with Walker.

Rule 1:4 establishes general requirements for pleading. Specifically, Rule 1:4(c) mandates that "Counsel or an unrepresented party who files a pleading shall sign it and state his address." *Rule 1:4(l)* requires "counsel of record" to list his or her office address and telephone number at the foot of "every pleading, motion or other paper served or filed." *Rule 1:5* states that "'Counsel of record' includes a counsel or party [***5] who has signed a pleading in the case or who has notified the other parties and the clerk in writing that he appears in the case."

In this case, Walker signed the pleading as an unrepresented party in conformance with Rule 1:4(c) and *(l)* but Cohen did not sign [*121] the pleading. Furthermore, Cohen's cover [**49] letter to the clerk of the court requesting filing does not notify other parties and the clerk in writing that he appears in the case. Consequently, it does not support the legal conclusion that he became counsel of record simply by virtue of a cover letter enclosing a pleading signed by a party.

The trial court erroneously concluded, under *Rule 1A:4* and our decision in *Wellmore Coal Corp. v. Harman Mining Corp., 264 Va. 279, 283, 568 S.E. 2d 671, 673 (2002)*, that Cohen was Walker's counsel of record at the time the motion for judgment was filed and that because Walker signed the pleading in error, it was consequently invalid. Rule *1A:4* deals with foreign attorneys and is inapplicable to this case. The final sentence of *Rule 1A:4* simply emphasizes that when foreign counsel is permitted to conduct a case in the Commonwealth, "a pleading or other paper required to be served, [***6] " shall, nonetheless, be signed by a member of the Virginia State Bar.

Further, the trial court placed great weight upon the finding that "Cohen continued to represent and protect Plaintiff's legal interests from the time she retained him until he transferred the remainder of her retainer fee to her current counsel." While true, it is not dispositive of the legal question whether Cohen was counsel of record in the pending case. Cohen's continued protection of Walker's legal interests was consistent with his duty

under Rule 1.16(d) of the Rules of Professional Conduct. Having determined that he was not going to represent Walker in her intended lawsuit, Cohen facilitated her filing of pleadings prepared by a different lawyer in order to toll the statute of limitations and preserve her cause of action. In this regard, Cohen was taking "steps to the extent reasonably practicable to protect a client's interests" upon the termination of his representation. Such conduct did not make him counsel of record in legal proceedings pending before the trial court.

We hold that the trial court erred in granting AAPECS' motion to quash and motion to strike and dismissing Walker's motion for judgment [***7] with prejudice. The judgment of the trial court will be reversed and the motion for judgment will be reinstated on the docket of the trial court.

Reversed and remanded.

FEDERAL RULES OF CIVIL PROCEDURE
TITLE III. PLEADINGS AND MOTIONS

Go to the United States Code Service Archive Directory

USCS Fed Rules Civ Proc R 11

Review Court Orders which may amend this Rule.

THE CASE NOTES SEGMENT OF THIS DOCUMENT HAS BEEN SPLIT INTO 2 DOCUMENTS.
THIS IS PART 1.
USE THE BROWSE FEATURE TO REVIEW THE OTHER PART(S).

Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name--or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it--an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) Sanctions.
(1) *In General.* If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been

violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) *Motion for Sanctions.* A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) *On the Court's Initiative.* On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) *Nature of a Sanction.* A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) *Limitations on Monetary Sanctions.* The court must not impose a monetary sanction:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(6) *Requirements for an Order.* An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) Inapplicability to Discovery. This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

HISTORY:

(Amended Aug. 1, 1983; Aug. 1, 1987; Dec. 1, 1993.)

(As amended Dec. 1, 2007.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Notes of Advisory Committee. This is substantially the content of former Equity Rules 24 (Signature of Counsel) and 21 (Scandal and Impertinence) consolidated and unified. Compare former Equity Rule 36 (Officers Before Whom Pleadings Verified). Compare to similar purposes, English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r 4, and *Great Australian Gold Mining Co. v. Martin, L. R., 5 Ch. Div. 1, 10 (1877).* Subscription of pleadings is required in many codes. 2 Minn. Stat. (Mason, 1927) § 9265; N.Y.R.C.P. (1937) Rule 91; 2 N.D. Comp. Laws Ann. (1913) § 7455.

This rule expressly continues any statute which requires a pleading to be verified or accompanied by an affidavit, such as:

U.S.C., Title 28 former:

§ 381 (Preliminary injunctions and temporary restraining orders).

§ 762 (Suit against the United States).

U.S.C., Title 28, former § 829 (now § 1927) (Costs; attorney liable for, when) is unaffected by this rule.

For complaints which must be verified under these rules, see Rules 23(b) (Secondary Action by Shareholders) and 65 (Injunctions).

For abolition of the rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances, see Pa. Stat. Ann. (Purdon, 1931) see 12 P.S. Pa., § 1222; for the rule in equity itself, see *Greenfield v. Blumenthal, 69 F.2d 294 (3d Cir. 1934).*

TITLE 8.01. CIVIL REMEDIES AND PROCEDURE
CHAPTER 7. CIVIL ACTIONS; COMMENCEMENT, PLEADINGS, AND MOTIONS
ARTICLE 2. PLEADINGS GENERALLY

GO TO CODE OF VIRGINIA ARCHIVE DIRECTORY

Va. Code Ann. § 8.01-271.1 (2012)

§ 8.01-271.1. Signing of pleadings, motions, and other papers; oral motions; sanctions

Except as otherwise provided in *§§ 16.1-260* and *63.2-1901*, every pleading, written motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, and the attorney's address shall be stated on the first pleading filed by that attorney in the action. A party who is not represented by an attorney, including a person confined in a state or local correctional facility proceeding pro se, shall sign his pleading, motion, or other paper and state his address.

The signature of an attorney or party constitutes a certificate by him that (i) he has read the pleading, motion, or other paper, (ii) to the best of his knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (iii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, written motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.

An oral motion made by an attorney or party in any court of the Commonwealth constitutes a representation by him that (i) to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and (ii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

If a pleading, motion, or other paper is signed or made in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed the paper or made the motion, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper or making of the motion, including a reasonable attorney's fee.

LEO: Attorney-Client Relationship, LE Op. 1127

Attorney-Client Relationship -*Pro Se* Litigant: Rendering Legal Assistance.

November 21, 1988

You have advised that a substantial part of your practice consists of employment and discrimination law, often representing employees. You further advised that you have been requested from time to time to provide assistance to certain individuals who are involved in litigation in which they are not represented by counsel and are proceeding *pro se*. In such situations, you indicate that oftentimes the *pro se* litigant encounters discovery requests and other matters with which he is unfamiliar.

You wish to know whether it is ethically permissible for a lawyer to advise and assist the *pro se* litigant in those circumstances providing, in addition to general legal advice, recommendations for courses of action to follow in discovery, legal research, and redrafting of documents prepared by the litigant himself. You specifically inquire as to any ethical restrictions relating to the attorney's preparation of discovery requests, pleadings, or briefs, for signature by the *pro se* litigant.

As defined in Part Six, Section I(A) of the Rules of Court, the relation of attorney and client exists whenever one furnishes to another advice or service under circumstances which imply his possession and use of legal knowledge or skill; and, specifically, whenever one "undertakes, *with or without compensation*, to prepare for another legal instruments of any character, other than notices or contracts incident to the regular course of conducting a licensed business" (emphasis added). Thus, the Committee believes that by providing advice and assistance to the *pro se* litigant as you have described, the attorney-client relationship is established.

The Committee opines that there is no prohibition under the Code of Professional Responsibility against the rendering of the types of advice and assistance you have described for a *pro se* client. However, the Committee directs your attention to DR:7-105(A), which requires that a lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding.

Under DR:7-105(A) and recent indications from the courts that attorneys who draft pleadings for *pro se* clients will be called upon by the court, any disregard by either the attorney or the *pro se* litigant of the court's requirement that the drafter of the pleadings be revealed would be violative of that disciplinary

rule. Such failure to disclose would also be violative of DR:7-102(A)(3), which requires that a lawyer shall not conceal or knowingly fail to disclose that which he is required by law to reveal. Under certain circumstances, such failure to disclose that the attorney provided active or substantial assistance, including the drafting of pleadings, may be a misrepresentation to the court and to opposing counsel and therefore violative of DR:1-102(A)(4). In a similar fact situation, the Association of the Bar of the City of New York opined that a lawyer drafting pleadings and providing other substantial assistance to a *pro se* litigant must obtain the client's assurance that the client will disclose that assistance to the court and adverse counsel. Failure to secure that commitment from the client or failure of the client to carry it out would require the attorney to discontinue providing assistance.

The Committee also directs your attention to the requirements of DR:6-102(A), which prohibits a lawyer from limiting his liability to a client for personal malpractice, and to the requirements of DR:2-107 and DR:2-108, regarding the acceptance of employment and termination of representation.

Committee Opinion November 21, 1988

American Bar Association
Annotated Model Rules of Professional Conduct, Seventh Edition
2011

RULES
CLIENT-LAWYER RELATIONSHIP

Rule 1.16 Declining or Terminating Representation

Ellen J. Bennett
Elizabeth J. Cohen
Martin Whittaker
Center for Professional Responsibility

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Comment

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.

Annotation

Overview

Model Rule 1.16 addresses the circumstances under which a lawyer must or may withdraw from representation or refuse to represent a client, and sets forth the obligations of a lawyer upon termination of the representation. A lawyer should not undertake representation unless it can be performed competently, promptly, and without conflict of interest. Model Rule 1.16, cmt. [[1]. Once a lawyer agrees to represent a client, the duties of competence (Model Rule 1.1) and diligence (Model Rule 1.3) imply an obligation to continue the representation through completion.

When seeking to withdraw from representing a client before a tribunal, the lawyer must comply with applicable legal procedures and must continue the representation if ordered to do so by a tribunal. Even after the representation ceases, the lawyer continues to have certain obligations to the client, including the duty to return documents and unearned fees, as well as the duties of confidentiality and loyalty. See generally Model Rule 1.1 (Competence); Model Rule 1.3 (Diligence); Model Rule 1.9 (Duties to Former Clients).

Subsection (a): Mandatory Withdrawal and Prohibited Representation

Subsection (a) requires a lawyer to withdraw or refuse to represent a client in certain circumstances, unless, as provided in subsection (c), the lawyer is ordered by a tribunal to continue the representation.

Subsection (a)(1): When Representation Would Result in Violation of Law or Ethics Rule

Subsection (a)(1) provides that a lawyer must decline or withdraw from representation when it would result in violation of the Rules of Professional Conduct or other law. See ABA Formal Ethics Op. 06-441 (2006) (“If a lawyer believes that her workload is such that she is unable to meet the basic ethical obligations required of her in the representation of a client, she must not continue the representation of that client”); see also Cargile v. Viacom Int'l, Inc., 282 F. Supp. 2d 1316 (N.D. Fla. 2003) (violation of this rule for lawyer not to withdraw after realizing claim had no merit and client refused to dismiss); Mulkey v. Meridian Oil Inc., 143 F.R.D. 257 (W.D. Okla. 1992) (lawyer must withdraw if he cannot handle caseload); People v. Johnson, 35 P.3d 168 (Colo. O.P.D.J. 1999) (lawyer failed to withdraw after suspension from practice); In re Humphrey, 725 N.E.2d 70 (Ind. 2000) (lawyer who continued representing client after case dismissed due to lawyer's lack of diligence and who failed to provide client with adequate information about status of matter violated rule by failing to withdraw); In re Holmberg, 135 P.3d 1196 (Kan. 2006) (lawyer represented clients when license suspended); In re Wooden, 562 S.E.2d 649 (S.C. 2002) (lawyer who neglected numerous cases should have withdrawn if unable to handle caseload); ABA Formal Ethics Op. 07-449 (2007) (lawyer simultaneously representing judge in one matter and

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Code of Virginia

*** Rules Amendments received by the Publisher from Virginia Supreme Court through November 1, 2012. ***
*** Remaining Rules current through October 5, 2012.***
*** Annotations current for Cases Received by October 13, 2012. ***

RULES OF SUPREME COURT OF VIRGINIA
PART SIX INTEGRATION OF THE STATE BAR
SECTION II. VIRGINIA RULES OF PROFESSIONAL CONDUCT
CLIENT-LAWYER RELATIONSHIP

Va. Sup. Ct. R. pt. 6, sec. II, 1.16 (2012)

Review Court Orders which may amend this Rule.

Rule 1.16. Declining Or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is illegal or unjust;

(2) the client has used the lawyer's services to perpetrate a crime or fraud;

(3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) other good cause for withdrawal exists.

(c) In any court proceeding, counsel of record shall not withdraw except by leave of court after compliance with notice requirements pursuant to applicable Rules of Court. In any other matter, a lawyer shall continue representation notwithstanding good cause for terminating the representation, when ordered to do so by a tribunal.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, refunding any advance payment of fee that has not been earned and handling records as indicated in paragraph (e).

(e) All original, client-furnished documents and any originals of legal instruments or official documents which are in the lawyer's possession (wills, corporate minutes, etc.) are the property of the client and, therefore, upon termination of the representation, those items shall be returned within a reasonable time to the client or the client's new counsel upon request, whether or not the client has paid the fees and costs owed the lawyer. If the lawyer wants to keep a copy of such original documents, the lawyer must incur the cost of duplication. Also upon termination, the client, upon request, must also be provided within a reasonable time copies of the following documents from the lawyer's file, whether or not the client has paid the fees and costs owed the lawyer: lawyer/client and lawyer/third-party communications; the lawyer's copies of client-furnished documents (unless the originals have been returned to the client pursuant to this paragraph); transcripts, pleadings and discovery responses; working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney work product documents prepared or collected for the client in the course of the representation; research materials; and bills previously submitted to the client. Although the lawyer may bill and seek to collect from the client the costs associated with making a copy of these materials, the lawyer may not use the client's refusal to pay for such materials as a basis to refuse the client's request. The lawyer, however, is not required under this Rule to provide the client copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations, or difficulties arising from the lawyer-client relationship. The lawyer has met his or her obligation under this paragraph by furnishing these items one time at client request upon termination; provision of multiple copies is not required. The lawyer has not met his or her obligation under this paragraph by the mere provision of copies of documents on an item-by-item basis during the course of the representation.

NOTES: [1] A lawyer should not accept or continue representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may wish an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

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Restatement of the Law, Third, The Law Governing Lawyers

Case Citations

Chapter 2 - The Client-Lawyer Relationship

Topic 5 - Ending a Client-Lawyer Relationship

Restat 3d of the Law Governing Lawyers, § 31

§ 31 Termination of a Lawyer's Authority

(1) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation and with an order of a tribunal requiring the representation to continue.

(2) Subject to Subsection (1) and § 33, a lawyer's actual authority to represent a client ends when:

(a) the client discharges the lawyer;

(b) the client dies or, in the case of a corporation or similar organization, loses its capacity to function as such;

(c) the lawyer withdraws;

(d) the lawyer dies or becomes physically or mentally incapable of providing representation, is disbarred or suspended from practicing law, or is ordered by a tribunal to cease representing a client; or

(e) the representation ends as provided by contract or because the lawyer has completed the contemplated services.

(3) A lawyer's apparent authority to act for a client with respect to another person ends when the other person knows or should know of facts from which it can be reasonably inferred that the lawyer lacks actual authority, including knowledge of any event described in Subsection (2).

COMMENTS & ILLUSTRATIONS: Comment:

a. Scope and cross-references. This Section deals with the termination of a lawyer's authority to act for a client in dealings with third persons, including tribunals. Termination as between client and lawyer is considered in § 32. A lawyer who wrongfully fails to withdraw can continue to have authority, even though thereby becoming subject to disciplinary sanctions and malpractice liability. For a lawyer's duty to protect a client's interests when a representation ends, see § 33. For the effect of termination on a lawyer's compensation, see § 40.

b. Rationale. Just as mutual consent is usually a prerequisite to creating the client-lawyer relationship, the end of such consent usually ends the relationship. Consent might end because client or lawyer withdraws consent or becomes incapable of giving a valid consent (but compare Comment *e*). Alternatively, the lawyer might have completed the representation or have become incapable of providing services to completion. However, a tribunal might in some circumstances deny a lawyer leave to withdraw. The rules stated in this Section also protect third persons who reasonably rely on a lawyer's apparent authority after the lawyer's actual authority has ended. For the rationale of the apparent-authority rules, see § 27, Comment *b*.

c. Court approval. Rules governing litigation typically require a lawyer to give notice or obtain court approval before withdrawing. In some situations the tribunal might require a lawyer to continue to serve even though the lawyer wishes to withdraw. If the tribunal improperly requires a lawyer to continue representation, the usual remedy for the lawyer or client is to appeal the order and obey it in the meantime. On violation of orders as a means of obtaining appellate review, see § 94, Comment *e*. A lawyer seeking leave of a tribunal to withdraw should avoid disclosure of confidential client information to the extent feasible.

Whether a lawyer may properly exercise the authority to represent a client after seeking leave to withdraw, but before the tribunal has acted, depends on the circumstances. If, for example, the client wishes the lawyer to continue the representation and doing so would require no improper behavior, the lawyer should ordinarily continue to act for the client until the tribunal has approved withdrawal. At the other extreme, if a client has discharged the lawyer, the lawyer ordinarily may act for the client only when essential to protect the client's interests (see § 33(1)). In any event, the tribunal might have continuing authority to provide notice to the client through the lawyer.

d. When a client discharges a lawyer. A principal can end an agent's actual authority by discharging the agent. Even if the discharge violates the contract between them, so that the principal is liable in damages to the agent, the agent's authority nonetheless terminates (see *Restatement Second, Agency § 118*). A client and lawyer cannot validly enter a contract forbidding the client to discharge the lawyer (see §§ 14 & 32).

e. A client's death or incompetence. A client's death terminates a lawyer's actual authority (see *Restatement Second, Agency § 120*). The rights of a deceased client pass to other persons--executors, for example--who can, if they wish, revive the representation. Procedural rules usually provide for substitution for the deceased client in actions to which the client was a party. The lawyer for the deceased client must cooperate in such a transition and seek to protect the deceased client's property and other rights (see § 33). In extraordinary circumstances, the lawyer may exercise initiative, for example taking an appeal when the time for doing so would expire before a personal representative could be appointed (see § 33, Comment *b*).

The general rule of agency law that the insanity or incompetence of a principal similarly terminates an agent's authority (see *Restatement Second, Agency § 122*) may be inappropriate as applied to a lawyer's beneficial efforts to protect the rights of a client with diminished capacity. Such a client continues to have rights requiring protection and often will be able to participate to some extent in the representation (see § 24). If representation were terminated automatically, no one could act for the client until a guardian is appointed, even in pressing situations. Even if the client has been adjudicated to be incompetent, it might still be desirable for the representation to continue, for example to challenge the adjudication on appeal or to represent the client in other matters. Although a lawyer's authority therefore does not terminate automatically in such circumstances, the lawyer must act in accordance with the principles of § 24 in exercising continuing authority.

Bankruptcy, loss of corporate privileges, and similar events can also remove the capacity of an organization or similar entity to function (see *Restatement Second, Agency §§ 114* & 122). With respect to the effect of termination of agency powers on actual and apparent authority, see id. § 124A.

f. A lawyer's withdrawal. A lawyer's withdrawal terminates authority, subject to the duties stated in § 33. The circumstances in which a lawyer may properly withdraw are stated in § 32. Withdrawal, whether proper or improper,

terminates the lawyer's authority to act for the client (see *Restatement Second, Agency § 118*). The client is not bound by acts of a lawyer who refuses to represent the client, except when a tribunal that must authorize the withdrawal has not done so (see Comment *c*).

When a client retains a lawyer who practices with a firm, the presumption is that both the lawyer and the firm have been retained (see § 14, Comment *h*). Hence, when a lawyer involved in a representation leaves the firm, the client can ordinarily choose whether to be represented by that lawyer, by lawyers remaining at the firm, by neither, or by both. In the absence of client direction, whether the departing lawyer continues to have authority to act for the client depends on the circumstances, including whether the client regarded the lawyer to be in charge of the matter, whether other lawyers working on the matter also leave, whether firm lawyers continue to represent the client in other matters, and whether the lawyer had filed an appearance for the client with a tribunal. Similar principles apply when a firm dissolves. When a lawyer leaves a large firm, for example, it can usually be assumed that, absent contrary client instructions or previous contract, the firm continues to represent the client in pending representations and the lawyer does not.

g. A lawyer's death, disbarment, disqualification, or incapacity. A lawyer who is dead can provide no representation; one who is disbarred or suspended cannot provide proper representation. A lawyer can be ordered by a tribunal to cease representing a client before the tribunal, for example because of a conflict of interest (see § 121, Comment *e(ii)*). Those occurrences terminate the lawyer's authority (see *Restatement Second, Agency §§ 121* & 122). Incapacity of a lawyer terminates the lawyer's authority only if the lawyer's incapacity is clear to persons dealing with the lawyer. Death or other incapacity of one lawyer does not ordinarily terminate the authority of other lawyers in the lawyer's firm (see Comment *f* hereto).

h. Termination by completion of contemplated services. A client and lawyer might agree that the representation will end at a given time or on the happening of a stated event (see *Restatement Second, Agency §§ 105* & 107). Alternatively, the client and lawyer may contemplate a continuing relationship in which the lawyer will handle legal matters as they arise. Such a contract defines the scope or aims of the representation (see § 19(1)). On differentiation between ongoing and completed representations for purposes of conflicts of interest, see § 132, Comment *c*.

The lawyer's authority ordinarily ends when the lawyer has completed the contemplated services (see *Restatement Second, Agency § 106*). A lawyer who has been retained to represent a client in a divorce, for example, has no authority to negotiate subsequent modifications of support or custody agreements without new authorization from the client.

The course of dealing might not clearly indicate what services were contemplated in the representation or whether the lawyer has a continuing duty to advise the client. Such uncertainty could lead to clients assuming that they were still being represented. Because contracts with a client are to be construed from the client's viewpoint (see § 18), the client's reasonable understanding of the scope of the representation controls. The client's relative sophistication in employing lawyers or lack thereof is relevant.

i. The end of a lawyer's apparent authority. When a lawyer's actual authority ends, the lawyer must no longer purport to exercise authority and must notify persons who the lawyer reasonably should know are relying on continuing existence of the authority (see § 33).

Despite cessation of actual authority, a lawyer might nevertheless continue to act for a client. Third persons, including officers of tribunals, might rely on the lawyer's apparent authority. For most purposes, the lawyer's apparent authority (see § 27) therefore continues after termination until an affected third person has enough information to put a reasonable person on notice that inquiry into the lawyer's continuing authority is appropriate (see *Restatement Second, Agency §§ 9*, 124A-133, & 135-137). On the liability of a lawyer who acts without actual authority, see § 27, Comment *f;* § 30(3) and Comment *e* thereto.

The rule followed in the few decided cases is that a principal's death automatically ends an agent's apparent as well as actual authority to act for the client (see *Restatement Second, Agency § 120*, Comment *c*). Under that rule, when a

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Restatement of the Law, Third, The Law Governing Lawyers

Case Citations

Chapter 5 - Confidential Client Information

Topic 2 - The Attorney-Client Privilege

Title C - Duration of the Attorney-Client Privilege; Waivers and Exceptions

Restat 3d of the Law Governing Lawyers, § 77

§ 77 Duration of the Privilege

Unless waived (see §§ 78-80) or subject to exception (see §§ 81-85), the attorney-client privilege may be invoked as provided in § 86 at any time during or after termination of the relationship between client or prospective client and lawyer.

COMMENTS & ILLUSTRATIONS: Comment:

a. Scope and cross-references. For limitations on the privilege in subsequent adverse proceedings between co-clients, see § 75(2), and in common-interest arrangements, see § 76(2). The right of the personal representative of a deceased client to assert or waive the privilege is stated in § 86(1)(a).

b. Termination of the client-lawyer relationship. The attorney-client privilege continues indefinitely. Termination of the client-lawyer relationship, even for cause, does not terminate the privilege.

c. Death of a client or cessation of existence of an organization. The privilege survives the death of the client. A lawyer for a client who has died has a continuing obligation to assert the privilege (see § 63, Comment *b*). On standing to assert the privilege, see § 86, Comments *c* and *d*.

The privilege is subject to exception in a controversy concerning a deceased client's disposition of property (see § 81). When ownership or control of an organizational client is transferred or when the organization ceases to exist, the right to invoke the privilege in behalf of the organization may also shift to others or terminate (see § 73, Comment *k*).

d. Situations of need and hardship. The law recognizes no exception to the rule of this Section. Set out below are considerations that may support such an exception, although no court or legislature has adopted it.

It would be desirable that a tribunal be empowered to withhold the privilege of a person then deceased as to a communication that bears on a litigated issue of pivotal significance. The tribunal could balance the interest in confidentiality against any exceptional need for the communication. The tribunal also could consider limiting the proof or sealing the record to limit disclosure. Permitting such disclosure would do little to inhibit clients from confiding in

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Restatement of the Law, Third, The Law Governing Lawyers

Case Citations

Chapter 2 - The Client-Lawyer Relationship

Topic 5 - Ending a Client-Lawyer Relationship

Restat 3d of the Law Governing Lawyers, § 32

§ 32 Discharge by a Client and Withdrawal by a Lawyer

(1) Subject to Subsection (5), a client may discharge a lawyer at any time.

(2) Subject to Subsection (5), a lawyer may not represent a client or, where representation has commenced, must withdraw from the representation of a client if:

(a) the representation will result in the lawyer's violating rules of professional conduct or other law;

(b) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(c) the client discharges the lawyer.

(3) Subject to Subsections (4) and (5), a lawyer may withdraw from representing a client if:

(a) withdrawal can be accomplished without material adverse effect on the interests of the client;

(b) the lawyer reasonably believes withdrawal is required in circumstances stated in Subsection (2);

(c) the client gives informed consent;

(d) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal, fraudulent, or in breach of the client's fiduciary duty;

(e) the lawyer reasonably believes the client has used or threatens to use the lawyer's services to perpetrate a crime or fraud;

(f) the client insists on taking action that the lawyer considers repugnant or imprudent;

(g) the client fails to fulfill a substantial financial or other obligation to the lawyer regarding the lawyer's services and the lawyer has given the client reasonable warning that the lawyer will withdraw unless the client fulfills the obligation;

(h) the representation has been rendered unreasonably difficult by the client or by the irreparable breakdown of the client-lawyer relationship; or

(i) other good cause for withdrawal exists.

(4) In the case of permissive withdrawal under Subsections (3)(f)-(i), a lawyer may not withdraw if the harm that withdrawal would cause significantly exceeds the harm to the lawyer or others in not withdrawing.

(5) Notwithstanding Subsections (1)-(4), a lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation and with a valid order of a tribunal requiring the representation to continue.

COMMENTS & ILLUSTRATIONS: Comment:

a. Scope and cross-references. This Section describes the right of a client to discharge a lawyer. Exercise of that right might have consequences for the lawyer's fee to be paid (see § 40). The Section also describes the discretion, and in some circumstances duty, of the lawyer to withdraw from the representation. The Section is related to the rules determining when the lawyer loses the authority to bind the client in dealings with third persons (see § 31, Comment *a*). A lawyer's duties to a client in the course of and after discharge or withdrawal are considered in § 33. On when a representation is established, see § 14 and § 31, Comment *h* (continuing representation). Concerning termination of a representation because of events other than the lawyer's discharge or withdrawal, for example because the client or lawyer dies, see § 31.

On withdrawal for the purpose of representing another client against the now-former client, see § 132, Comment *c*.

A lawyer who improperly fails to withdraw after being discharged or when withdrawal is otherwise required is, in general, subject to professional discipline and, in litigation matters, to sanctions imposed by the tribunal (see § 110, Comment *c*). The lawyer is also liable to the client for acting without authority or improperly failing to withdraw, except in circumstances in which the client is responsible for the failure (see § 27, Comment *f*, & § 33, Comment *g*). For example, a client who insists that a lawyer continue, although aware of the lawyer's illness and its implications, cannot subsequently recover from the lawyer on a claim that the lawyer should have withdrawn.

A lawyer who withdraws, or tries to withdraw, other than as allowed by this Section is subject to professional discipline (§ 5) and breaches a duty to the client (see § 50). The lawyer's duty or authority to withdraw is subject to the authority of a tribunal to require that the lawyer continue the representation (see Subsection (5) & Comment *d* hereto). A lawyer who withdraws must take reasonable steps to protect a client's interests as stated in § 33.

b. Discharge by a client. A client may always discharge a lawyer, regardless of cause and regardless of any agreement between them. A client is not forced to entrust matters to an unwanted lawyer. However, a client's discharge of a lawyer is not always without adverse consequence, for example when a tribunal declines to appoint new counsel for an indigent criminal defendant or denies a continuance for the client to seek new counsel.

A discharged lawyer loses actual authority to act (see § 31(1)(a)). The lawyer must also attempt to withdraw (see § 32(2)(c)), taking reasonable steps to protect the client's interests (see § 33(1)) and complying with procedural rules governing withdrawal (see § 31, Comment *c*).

As stated in § 37, Comment *e*, when a lawyer is also an employee of a client (for example, a lawyer employed as inside legal counsel by a corporation or government agency), the client's right to discharge the lawyer does not abridge

the lawyer's entitlement to salary and benefits already earned. A lawyer-employee also has the same rights as other employees under applicable law to recover for bad-faith discharge, for example if the client discharged the lawyer for refusing to perform an unlawful act. Because of the importance of such a lawyer's role in assuring law compliance, the public policy that supports a remedy for such discharges is at least as strong in the case of lawyers as it is for other employees (see § 23(1)). The power a client employer possesses over a lawyer-employee is substantial, compared to that of a client over an independent lawyer. Giving an employed lawyer a remedy for wrongful discharge does not significantly impair the client's choice of counsel.

c. Rationale for lawyer-withdrawal rules. Restrictions on the right of a lawyer to withdraw from a representation are based in part on contract law. Restrictions are appropriate even when ceasing representation would not constitute an actionable breach of contract. Particularly in view of the duties that lawyers have toward clients, a lawyer who undertakes a representation ordinarily should see it through to the contemplated end of the lawyer's services when failure to do so would inflict burdens on the client. Accordingly, the general rule is that a lawyer must persist despite unforeseen difficulties and carry through the representation to its intended conclusion, with the limited exceptions stated in Subsection (3). On the other hand, the interests of third persons and the public require lawyers to withdraw rather than assist unlawful acts (see § 23(2); see also § 94), or if another of the limited circumstances stated in Subsection (2) is present.

The rules governing withdrawal applied by tribunals have been largely drawn from the lawyer codes, with common-law corollaries. A client-lawyer contract complying with §§ 18 and 19 may modify the otherwise-applicable rules of permissive withdrawal. See also Comment *i* hereto.

d. Approval of a tribunal. Rules of tribunals typically require approval of the tribunal when a lawyer withdraws from a pending matter (see § 31, Comment *c*, & § 105). In applying to a tribunal for approval of withdrawal, a lawyer must observe the requirements of confidentiality (see § 60), unless an exception (see §§ 61-67) applies. In applying to withdraw under Subsection (3)(f), for example, it would not be permissible for the lawyer to state that the client intended to pursue a repugnant objective. A lawyer therefore will often be limited to the statement that professional considerations motivate the application.

If a tribunal denies permission to withdraw, the lawyer must proceed with the representation in a manner best calculated to further lawful objectives of the client (see § 16). The lawyer is not thereby authorized to violate law or any rule of professional conduct in the representation, other than as necessitated in complying with the direct order of the tribunal (see § 105). Similarly, a lawyer is not required to carry out a client instruction that the lawyer reasonably believes to be unethical or otherwise objectionable (see § 21, Comment *d*).

In considering permissive withdrawal (Subsection (3)), a lawyer should take into account whether the tribunal may refuse permission. The tribunal may do so, for example, because of adverse effect on the court's docket.

e. A lawyer's reasonable belief. Even if a tribunal concludes that a lawyer was required to withdraw under this Section, the lawyer is not subject to professional discipline or liability to a client if the lawyer reasonably believed, based on adequate investigation and consideration of the relevant facts and law, that withdrawal was not required. Also, a lawyer is not subject to discipline or liability for withdrawing if the lawyer reasonably believed, after similar investigation and consideration, that cause existed. However, when a tribunal is determining whether to compel or allow withdrawal, its concern is not with the lawyer's reasonable belief (except under Subsections (3)(b), (d), & (e) and Subsection (4)) but with whether the requirements stated in the Section have in fact been satisfied.

f. Withdrawal to avoid involvement in unlawful acts. Subsection (2)(a) requires a lawyer to withdraw when the representation will result in the lawyer's violating rules of professional conduct or other law. A prominent example of a representation violating rules of professional conduct would be a representation prohibited by conflict-of-interest rules (see Chapter 8). On what acts are unlawful within the meaning of the Subsection, see § 23, Comment *c*. Disciplinary rules typically are interpreted to prohibit "knowing" unjustified withdrawal. Accordingly, a lawyer is not subject to

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Restatement of the Law, Third, The Law Governing Lawyers

Case Citations

Chapter 2 - The Client-Lawyer Relationship

Topic 5 - Ending a Client-Lawyer Relationship

Restat 3d of the Law Governing Lawyers, § 33

§ 33 A Lawyer's Duties When a Representation Terminates

(1) In terminating a representation, a lawyer must take steps to the extent reasonably practicable to protect the client's interests, such as giving notice to the client of the termination, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee the lawyer has not earned.

(2) Following termination of a representation, a lawyer must:

(a) observe obligations to a former client such as those dealing with client confidences (see Chapter 5), conflicts of interest (see Chapter 8), client property and documents (see §§ 44-46), and fee collection (see § 41);

(b) take no action on behalf of a former client without new authorization and give reasonable notice, to those who might otherwise be misled, that the lawyer lacks authority to act for the client;

(c) take reasonable steps to convey to the former client any material communication the lawyer receives relating to the matter involved in the representation; and

(d) take no unfair advantage of a former client by abusing knowledge or trust acquired by means of the representation.

COMMENTS & ILLUSTRATIONS: Comment:

a. Scope and cross-references. This Section describes the duties of a lawyer during (see § 33(1)) and after (see § 33(2)) the termination of a client-lawyer relationship. The Section applies regardless of whether client or lawyer initiates the termination or whether termination occurs prematurely or when contemplated. Grounds for termination are set forth in §§ 31 and 32. Former clients owe the duty discussed in Chapter 3 to compensate for services rendered.

b. Protecting a client's interests when a representation ends. Ending a representation before a lawyer has completed a matter usually poses special problems for a client. Beyond consultation required before withdrawal (see § 32, Comment *n*), in the process of withdrawal itself a lawyer might be required to consult with the client and engage in

other protective measures. New counsel must be found, papers and property retrieved or transferred, imminent deadlines extended, and tribunals and opposing parties notified to deal with new counsel. Lawyers must therefore take reasonably appropriate and practicable measures to protect clients when representation terminates.

What efforts are appropriate and practicable depends on the circumstances, including the subsisting relationship between client and lawyer. The lawyer must ordinarily advise the client of the implications of termination, assist in finding a new lawyer, and devote reasonable efforts to transferring responsibility for the matter. The lawyer must make the client's property and papers available to the client or the client's new lawyer, except to the extent that the lawyer is entitled to retain them. If the client is threatened with an imminent deadline that will expire before new counsel can act, the lawyer must take reasonable steps either to extend the deadline or comply with it (see § 31, Comment *e*). Failure to take such steps can give rise to disciplinary sanctions and malpractice liability. In some situations, the lawyer will be considered still to be the client's representative. Fewer measures usually are required when other lawyers representing the client in the same matter continue to do so (see § 32, Comment *h(ii))*.

c. Client confidences. A lawyer's obligation to protect the confidences of a client, addressed in detail in Chapter 5, continues after the representation ends.

d. Former-client conflicts of interest. Following termination, the former-client conflict-of-interest rules apply (see § 132). On consent, see Comment *i* hereto and § 122. On a former government lawyer, see § 133.

e. A former client's property and documents. The duties of a lawyer to protect and deliver a client's property and documents (see §§ 44-46) continue after the representation ends. Termination entails special duties to deliver to the client property (see § 45, Comment *b*) and documents or copies (see § 46(2)). The lawyer may not keep the client's property or documents in order to secure payment of compensation, except when the lawyer has a valid lien (see § 43) or when the client has not paid for the lawyer's work product (see § 46(3)).

f. Collecting compensation and returning unearned fees. The lawyer's efforts to collect compensation are governed by the requirements stated in Chapter 3.

g. The duty not to act for a former client. When representation ends a lawyer loses actual authority to act on behalf of the client (see § 31). Purporting to do so subjects the lawyer to discipline and can make the lawyer liable to the former client (see § 27, Comment *f*, & Chapter 4; *Restatement Second, Agency § 386*) or to third persons who have relied on the lawyer's claimed authority (see § 30(4) & Comment *e* thereto). However the lawyer retains authority to take steps protecting the client's interests (see Comment *b* hereto). The former client can also authorize the lawyer to act, for example by asking the lawyer to convey a request for additional time to opposing counsel.

h. Conveying communications to a former client. After termination a lawyer might receive a notice, letter, or other communication intended for a former client. The lawyer must use reasonable efforts to forward the communication. The lawyer ordinarily must also inform the source of the communication that the lawyer no longer represents the former client (see Comment *g* hereto). The lawyer must likewise notify a former client if a third person seeks to obtain material relating to the representation that is still in the lawyer's custody.

A lawyer has no general continuing obligation to pass on to a former client information relating to the former representation. The lawyer might, however, have such an obligation if the lawyer continues to represent the client in other matters or under a continuing relationship. Whether such an obligation exists regarding particular information depends on such factors as the client's reasonable expectations; the scope, magnitude, and duration of the client-lawyer relationship; the evident significance of the information to the client; the burden on the lawyer in making disclosure; and the likelihood that the client will receive the information from another source.

i. The duty not to take unfair advantage of a former client. A lawyer may not take unfair advantage of a former client by abusing knowledge or trust acquired through the representation (see §§ 41 & 43; *Restatement Second, Agency § 396(d)*). For example, a lawyer seeking a former client's consent to a conflict of interest (see § 132) must make

adequate disclosure of facts that the former client should know in order to consider whether to consent (see § 122, Comment *c(i)*).

REPORTERS NOTES: REPORTER'S NOTE

Comment b. Protecting a client's interests when a representation ends. Section 33(1) is drawn, with clarifying stylistic changes, from ABA Model Rules of Professional Conduct, Rule 1.16(d) (1983), and ABA Model Code of Professional Responsibility, DR 2-110(A)(2) (1969). On required protective measures, see *Hanlin v. Mitchelson, 794 F.2d 834 (2d Cir.1986)* (malpractice claim for failure of lawyer to have client's arbitration award confirmed or notify client clearly of withdrawal); *Olguin v. State Bar, 616 P.2d 858 (1980)* (discipline for not answering substitute lawyer's inquiries or providing files); *Academy of California Optometrists, Inc. v. Superior Court, 124 Cal.Rptr. 668 (Cal.Dist.Ct.App.1975)* (former lawyer ordered to turn over files); *People v. Archuleta, 638 P.2d 255 (Colo.1981)* (discipline for leaving practice without arranging for substitute counsel); *People v. Gellenthien, 621 P.2d 328 (Colo.1981)* (discipline for failing to refund unearned fees when hospitalization required withdrawal); Central Cab Co. v. *Clarke, 270* A.2d 662 (Md.1970) (malpractice liability for not notifying client of withdrawal, leading to default judgment against client); *Matter of Schwartz, 493 A.2d 1248 (N.J.1985)* (discipline for withdrawing without notice to client); *Dayton Bar Ass'n v. Weiner, 317 N.E.2d 783 (Ohio 1974)* (discipline for refusing to file divorce decree until paid); § 45, Comment *b*, and Reporter's Note thereto (returning unearned fees); § 46, Comment *c* (returning files).

A lawyer who does not perform the duties attendant on withdrawal, especially notifying the client, might be deemed not to have withdrawn and therefore be subject to malpractice liability. E.g., *Hanlin v. Mitchelson, 794 F.2d 834 (2d Cir.1986);* § 31, Comment *c*, and Reporter's Note thereto; see *North Carolina State Bar v. Sheffield, 326 S.E.2d 320 (N.C.Ct.App.1985),* cert. denied, *332 S.E.2d 482* (N.C.), cert. denied, *474 U.S. 981, 106 S.Ct. 385, 88 L.Ed.2d 338 (1985)* (discipline for neglect). Similarly, failure to notify a law firm's client that a lawyer is leaving the firm or the firm is dissolving might result in the lawyer's continuing to be liable for subsequent negligence of other firm lawyers involving that client. *Palomba v. Barish, 626 F.Supp. 722 (E.D.Pa.1985); Redman v. Walters, 152 Cal. Rptr. 42 (Cal.Dist.Ct.App.1979); Staron v. Weinstein, 701 A.2d 1325 (N.J.Super.Ct.App.Div.1997); Vollgraff v. Block, 458 N.Y.S.2d 437 (N.Y.Sup.Ct.1982).*

Comment c. Client confidences. See § 59, Comment *c*, and Reporter's Note thereto; § 69, Comment *b*; § 90, Comment *c* (work product).

Comment d. Former-client conflicts of interest. See §§ 132 and 133, Reporter's Notes.

Comment e. A former client's property and documents. See § 45, Comment *b*, and Reporter's Note thereto; § 46, Comment *d*, and Reporter's Note thereto.

Comment f. Collecting compensation and returning unearned fees. See § 41, Reporter's Note; § 42, Comment *b*, and Reporter's Note thereto; see also §§ 40 and 43.

Comment g. The duty not to act for a former client. See *Sterling v. Jones, 233 So.2d 537 (1970)* (client entitled to relief from default judgment entered when lawyer withdrew and then purported to cancel pleadings filed for client); *State v. Dickens, 519 P.2d 750 (Kan.1974)* (discipline for acting after client's death); *In re Collins, 271 S.E.2d 473 (Ga.1980)* (discipline for failure of lawyer to withdraw after discharge); § 32, Comment *b*, and Reporter's Note thereto (similar). On a lawyer's liability for acting without authority, see § 27, Comment *f*, and Reporter's Note thereto; § 30, Comment *e*, and Reporter's Note thereto.

Comment h. Conveying communications to a former client. Decisions conflict on whether an opposing party can give notice of a proceeding to modify or enforce a child-support decree by notifying the lawyer who formerly represented a party in the original proceeding. Compare *Griffith v. Griffith, 247 S.E.2d 30 (N.C.Ct.App.1978)* (notice adequate), with *Guthrie v. Guthrie, 429 S.W.2d 32 (Ky.1968)* (notice invalid), with *Jarvis v. Jarvis, 664 S.W.2d 694*

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Restatement of the Law, Third, The Law Governing Lawyers

Case Citations

Chapter 3 - Client and Lawyer: The Financial and Property Relationship

Topic 2 - A Lawyer's Claim to Compensation

Restat 3d of the Law Governing Lawyers, § 40

§ 40 Fees on Termination

If a client-lawyer relationship ends before the lawyer has completed the services due for a matter and the lawyer's fee has not been forfeited under § 37:

(1) a lawyer who has been discharged or withdraws may recover the lesser of the fair value of the lawyer's services as determined under § 39 and the ratable proportion of the compensation provided by any otherwise enforceable contract between lawyer and client for the services performed; except that

(2) the tribunal may allow such a lawyer to recover the ratable proportion of the compensation provided by such a contract if:

(a) the discharge or withdrawal is not attributable to misconduct of the lawyer;

(b) the lawyer has performed severable services; and

(c) allowing contractual compensation would not burden the client's choice of counsel or the client's ability to replace counsel.

COMMENTS & ILLUSTRATIONS: Comment:

a. Scope and cross-references. This Section considers how a lawyer's compensation is affected when a client-lawyer relationship ends before completion of the lawyer's services. On the circumstances in which a client may discharge a lawyer and in which a lawyer must or may withdraw, see § 32. The rules set forth here apply when the lawyer seeks to recover a fee and when the client, having paid in advance or otherwise, claims a refund. See § 33(1) (lawyer must return unearned fees when representation ends) and § 42 (client's suit for refund). Whatever the basis of the fee computation, the lawyer's fee may not be larger than is reasonable (see § 34).

This Section concerns only the lawyer's fee, not the lawyer's civil liability, which is considered in Chapter 4. On forfeiture of a lawyer's fee, see § 37 and Comment *e* hereto.

b. Measure of compensation when a client discharges a lawyer. A client might discharge a lawyer before

substantial completion of the services. The discharge might occur in circumstances not justifying forfeiture of the lawyer's compensation, for example because the client decides unreasonably that the lawyer's approach to the matter is inappropriate. Some older decisions reason that such a lawyer, not having violated the contract, is entitled to receive the contractual fee less the value of any services the lawyer avoided by being discharged. Alternatively, it could be argued that the lawyer should be able to treat the contract as revoked and recover in quantum meruit under § 39 the fair value of whatever services the lawyer rendered, even if that recovery exceeds the contractual price.

Those approaches are incorrect except in the circumstances in which contractual recovery is appropriate (see Subsection (2) and Comments *c* and *d* hereto). The discharged lawyer has not completed the work for which the contractual fee was due. Noncompletion results not from any improper act of the client, but from the client's exercise of the right to discharge counsel (see § 32). That right should not be encumbered by permitting the lawyer the option of either recovery at the contractual rate or in quantum meruit without appropriate adjustment for work yet to be performed.

The rule of § 40(1) entitles the discharged lawyer to the lesser of the fair value of the lawyer's services and the contractual fee prorated for the services actually performed. See *Restatement Second, Agency § 452* (when principal exercises privilege of termination, agent recovers agreed compensation for services for which contract appoints compensation plus value of other services, not exceeding ratable proportion of the agreed compensation). The lawyer receives a fair fee. The client pays only for work already performed and should be able to find new counsel willing not to charge for work already performed. Limiting recovery to the contractual fee, moreover, accepts the parties' own valuation of the worth of the whole representation as a limit on the valuation of part of it. See § 39, Comment *e*; see also § 37, Comment *e* (discharged lawyer who was client's employee does not forfeit salary otherwise due). If the contractual fee was an hourly one and the fee is reasonable (see § 34), the fair value of the lawyer's services is usually the same as the hourly fee for the number of hours worked (see Illustration 4 hereto).

It is an assumption of each of the following Illustrations that the circumstances warrant neither fee forfeiture (see § 37 & Comment *e* hereto) nor contractual recovery (see Comments *c* & *d* hereto).

Illustrations:

1. Client retained Lawyer to handle Client's divorce. Lawyer requested and Client paid $ 2,000 in advance, as full payment. After Lawyer had worked eight hours out of the approximately 16 likely to be needed, Client discharged Lawyer in order to hire Client's brother. (a) If the fair value of Lawyer's work is $ 100 per hour, Lawyer is entitled to $ 800 for the eight hours actually worked. Lawyer must refund the rest of the $ 2,000. (b) If the fair value of Lawyer's work is $ 300 per hour, Lawyer is entitled to that part of the $ 2,000 applicable to the work performed, that is to $ 1,000 and not the fair value of $ 2,400, because $ 1,000 was the contractual price for the work Lawyer performed, which was approximately half of the work actually contemplated. Lawyer is not entitled to the full $ 2,000 lump-sum fee because that fee contemplated performance of all work involved in Client's divorce. Accordingly, the $ 2,000 must be prorated to reflect the extent of Lawyer's actual services.

2. The same facts as in Illustration 1, except that the $ 2,000 advance payment is designated in the contract between Client and Lawyer not as full payment for Lawyer's services but as a nonrefundable engagement retainer (see § 34, Comment *e*). If the fair value of Lawyer's work is $ 100 per hour, Lawyer is entitled to $ 800 for the eight hours worked. Because Client and Lawyer had agreed to an engagement retainer to ensure that Lawyer would be compensated for costs incurred in reliance on being retained, Lawyer can also recover for the fair value not exceeding $ 2,000 (see § 39) of expenses or loss of income Lawyer reasonably incurred by accepting the engagement retainer (see § 34, Comment *e*).

3. The same facts as in Illustration 1, except that the $ 2,000 payment is designated in the fee contract as a nonrefundable engagement-retainer fee (see § 34, Comment *e*), and the contract between

Client and Lawyer further provides that Lawyer is to be compensated at Lawyer's typical hourly rate of $ 100 per hour. If $ 100 is the fair value of Lawyer's services, Lawyer is entitled to $ 800 for the eight hours worked. In addition, if $ 2,000 is a reasonable amount to charge in the circumstances as an engagement retainer (id.), Lawyer is entitled to retain that $ 2,000.

4. Client retained Lawyer to bring a tort suit for a contingent fee of one-third of any recovery. Client discharged Lawyer after Lawyer had worked 100 hours, because Client found Lawyer's manner overbearing. The fair value of Lawyer's time is $ 100 per hour. Until Client prevails in the suit, Lawyer has no right to a fee, because under the contract no fee was due unless and until Client recovered (see § 38(3)(d)). If Client recovers $ 60,000, Lawyer is entitled to $ 10,000, which is the lesser of the contractual fee ($ 20,000) and the fair value of Lawyer's services (100 hours at $ 100 per hour, or $ 10,000).

5. Client retained Lawyer to prepare a securities registration statement for a fee of $ 100 per hour. Because Client preferred to work with another lawyer, Client discharged Lawyer after Lawyer had worked 80 hours but before Lawyer had substantially completed the work. Client owes Lawyer $ 8,000, unless the tribunal finds that the fair value of Lawyer's services was less than the rate to which Client and Lawyer agreed. Even if the tribunal makes such a finding, to the extent that successor counsel would not have to repeat what the discharged lawyer has already done, the lawyer has completed a severable part of the services and may recover at the contractual rate (see Comment *c* hereto).

c. Allowing a contractual fee. Allowing a discharged or withdrawing lawyer to recover compensation under a fee contract with the client is sometimes more appropriate than fee forfeiture or recovery of the lesser of fair value and contractual compensation. The most common situation calling for such treatment is where the client discharges a contingent-fee lawyer without cause just before the contingency occurs, perhaps in order to avoid paying the contractual percentage fee. The reasons for the usual restrictions on contractual recovery then do not apply. See *Restatement Second, Agency §§ 445* and 454 (recovery of contractual compensation by agent when compensation depends on specified result and principal discharges agent in bad faith).

The tribunal therefore may in its discretion allow contractual compensation when circumstances warrant it, as specified in Subsection (2). As is true when a contractual fee is calculated under Subsection (1), the contractual fee is prorated for the services actually performed (see Comment *b* hereto). For example, if a lawyer who has performed half of the work required on a matter subject to a contingent-fee contract is allowed under Subsection (2) to recover a contractual fee, the lawyer should recover half of the contingent fee.

Whether the discharge or withdrawal is attributable to the lawyer's misconduct is relevant to whether contractual compensation should be allowed (see *Restatement Second, Agency §§ 455* & 456). The claim to contractual compensation of a lawyer discharged without reasonable grounds, or forced to withdraw by a client's misconduct (see § 32), is stronger than that of a lawyer whose acts have provided such grounds, even if not warranting forfeiture of the entire fee (see § 37), or civil liability (see Chapter 4). In the context of Subsection (2), misconduct of the lawyer is not limited to conduct that would warrant professional discipline (see § 5), fee forfeiture (see § 37), or civil liability (see Chapter 4). It also includes other conduct that would cause a reasonable client to discharge the lawyer, for example, a series of errors that reasonably leads the client to doubt the lawyer's competence although they cause no damage and do not constitute incompetence subjecting the lawyer to discipline.

The lawyer's provision of severable services (Subsection (2)(b)) is also a prerequisite for granting compensation at the contractual rate for those services. When a new lawyer would not have to repeat what has already been done in order to carry on the representation and when it is possible (for example, because the parties agreed to an hourly fee) to determine with reasonable accuracy the portion of the contractual fee allocable to the services performed, there is less occasion than otherwise to apply the rule of Subsection (1). See *Restatement Second, Agency §§ 452*, 455, and 456 (using as criterion whether compensation is apportioned in the contract).

A third condition stated in Subsection (2)(c) is whether allowing contractual compensation would significantly burden the client's choice of counsel or ability to change counsel, a choice which the rule of Subsection (1) protects. For example, contractual compensation is more appropriate if the lawyer's discharge or withdrawal occurred when the client could find replacement counsel without significant delay or risk.

d. The measure of compensation when a lawyer withdraws. A lawyer may properly withdraw on various grounds, for example because the client insists that the lawyer perform services in a manner that would violate a lawyer code or refuses to pay the lawyer's proper fees (see § 32). If the requirements of Subsection (2) are not met and there is no forfeiture, the withdrawing lawyer's compensation is limited to the lesser of the contractual fee for the services performed or the fair value of the lawyer's services. Were that not so, lawyers would be encouraged to withdraw before being discharged in order to avoid the rule of Subsection (1).

When the lawyer withdraws for reasons not attributable to misconduct of the lawyer, the lawyer has performed severable services, and allowing contractual compensation would not significantly burden the client's choice of counsel or ability to replace counsel (see Comment *c* hereto), the tribunal may in its discretion allow the lawyer to recover at the contractual rate under Subsection (2).

e. Forfeiture by a withdrawing or discharged lawyer. A lawyer who withdraws in violation of § 32 or commits misconduct before completing services, in some circumstances will forfeit the right to compensation for services already performed or to be performed (see § 37). On the scope of forfeiture, see § 37, Comment *e*.

A lawyer who withdraws has the burden of persuading the trier of fact that the withdrawal is not attributable to a clear and serious violation of the lawyer's duty (see § 16) to render loyal and competent service. See *Restatement Second, Contracts §§ 237* and 241; compare *Restatement Second, Agency § 456* (agent who wrongfully renounces contract or is properly discharged for breach loses all compensation except for services for which contract apportioned compensation, unless agent's breach was not willful and deliberate). For example, a lawyer who knowingly or recklessly undertakes to represent a client in a suit against another client of the lawyer's firm without the consent of both clients in violation of § 128(2) is subject to forfeiture of compensation even though the lawyer's withdrawal is compelled under § 32(2)(a). Withdrawal in violation of § 32 can similarly subject the lawyer to forfeiture.

On the other hand, forfeiture is inappropriate when the lawyer's withdrawal or discharge is not attributable to the lawyer's clear and serious violation of duty to the client. For example, the lawyer might have withdrawn or have been discharged because the client insisted that the lawyer violate professional rules. So also, a merger of a corporate client might have created a conflict of interest, requiring the lawyer to withdraw (see § 121, Comment *e(v)*). Similarly, forfeiture is inappropriate where termination is compelled by events beyond the lawyer's reasonable control, such as the lawyer's death or illness.

f. Compensation when there is no contract. When a lawyer and client have no fee contract meeting the requirements of § 18 and other applicable law, the lawyer is entitled to the fair value of the lawyer's services as set forth in § 39, except where forfeiture is warranted (see § 37).

REPORTERS NOTES: REPORTER'S NOTE

Comment a. Scope and cross-references. On malpractice liability for improper withdrawal, see *Delesdernier v. Porterie, 666 F.2d 116 (5th Cir. 1982);* Annot., *6 A.L.R.4th 342 (1981).*

Comment b. Measure of compensation when a client discharges a lawyer. For the older rule allowing a lawyer discharged without cause to recover the contractual fee, see, e.g., *Tonn v. Reuter, 95 N.W.2d 261 (Wis. 1959);* see *In re Downs, 363 S.W.2d 679, 686 (Mo.1963)* (lawyer may elect contractual fee or quantum meruit) (overruled in the *Plaza Shoe Store* case, cited below); *Cohen v. Radio-Electronics Officers Union, 679 A.2d 1188 (N.J.1996)* (when lawyer on continuing retainer negotiates notice-of-termination clause with sophisticated client in return for fee reduction and client

Transactions With Persons Other Than Clients

Rule 4.3 Dealing With Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

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Code of Virginia

*** Rules Amendments received by the Publisher from Virginia Supreme Court through November 1, 2012. ***
*** Remaining Rules current through October 5, 2012.***
*** Annotations current for Cases Received by October 13, 2012. ***

RULES OF SUPREME COURT OF VIRGINIA
PART SIX INTEGRATION OF THE STATE BAR
SECTION II. VIRGINIA RULES OF PROFESSIONAL CONDUCT
TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

Va. Sup. Ct. R. pt. 6, sec. II, 4.3 (2012)

Review Court Orders which may amend this Rule.

Rule 4.3. Dealing with Unrepresented Persons

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

(b) A lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interest of the client.

NOTES: [1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.

Virginia Code Comparison

Paragraph (a) is identical to DR 7-103(B) and paragraph (b) is similar to DR 7-103(A)(2).

Committee Commentary

The Virginia Code had deviated from the ABA Model Code by using the language of ABA Model Rule 4.3(a) as DR 7-103(B). This provision continues unchanged in Rule 4.3.

1 of 1 DOCUMENT

Restatement of the Law, Third, The Law Governing Lawyers

Case Citations

Chapter 6 - Representing Clients--in General

Topic 3 - Lawyer Dealings with a Nonclient

Title C - Dealings with an Unrepresented Nonclient

Restat 3d of the Law Governing Lawyers, § 103

§ 103 Dealings with an Unrepresented Nonclient

In the course of representing a client and dealing with a nonclient who is not represented by a lawyer:

> **(1) the lawyer may not mislead the nonclient, to the prejudice of the nonclient, concerning the identity and interests of the person the lawyer represents; and**
>
> **(2) when the lawyer knows or reasonably should know that the unrepresented nonclient misunderstands the lawyer's role in the matter, the lawyer must make reasonable efforts to correct the misunderstanding when failure to do so would materially prejudice the nonclient.**

COMMENTS & ILLUSTRATIONS: Comment:

a. Scope and cross-references. This Section states the rule prohibiting a lawyer from misrepresenting material matters concerning the lawyer's representational role when dealing with an unrepresented nonclient. The rule is drawn primarily from the lawyer codes, except that they do not require the element of prejudice to the nonclient. That element is, however, usually required for the purposes of civil liability.

The rule of this Section is a particular application of the general legal prohibitions against misrepresentation stated in § 98. On statements made in the course of representing a client in legislative and administrative matters, see § 104. On dealings with represented nonclients, see §§ 99-101. On limitations on the scope of communications with employees and other agents of a represented organization, see § 100, Comment *i*, and § 102. On communications with an unrepresented constituent of a lawyer's own organizational client, see Comment *e* hereto.

On remedies, see Comment *f*. Remedies available for violation of the rules of this Section, where the appropriate additional elements necessary for relief have been shown, are listed in § 99, Comment *n*. In particular, misrepresentation and similar overreaching of an unrepresented nonclient may make rescission appropriate.

b. Rationale. Active negotiation by a lawyer with unrepresented nonclients is appropriate in the course of representing a client. In dealing with an unrepresented nonclient, a lawyer's words and actions can result in a duty of

611 S.E.2d 375
269 Va. 583
Timothy Martin BARRETT
v.
VIRGINIA STATE BAR.
Record No. 042336.
Supreme Court of Virginia.
April 22, 2005.
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Michael L. Rigsby (Carrell, Rice & Rigsby, on briefs), Richmond, for appellant.

James W. Hopper, Senior Assistant Attorney General (Jerry W. Kilgore, Attorney General; Judith Williams Jagdmann, Deputy Attorney General; Edward M. Macon, Senior Assistant Attorney General, on brief), for appellee.

Present: HASSELL, C.J., KEENAN, KOONTZ, KINSER, LEMONS, and AGEE, JJ., and COMPTON, S.J.

AGEE, Justice.

This case presents an appeal of right from a ruling of the Virginia State Bar Disciplinary Board ("the Board"). Timothy M. Barrett challenges the Board's order of August 5, 2004, suspending his license to practice law in the Commonwealth for a period of three years based upon findings that Barrett violated Rules 3.1, 3.4(i), 3.4(j), 3.5(e), 4.3(b), and 8.4(b) of the Virginia Rules of Professional Conduct.[1]

In reviewing the Board's decision in a disciplinary proceeding, we conduct an independent examination of the entire record. We consider the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the Bar, the prevailing party in the Board proceeding. We give the Board's factual findings substantial weight and view them as prima facie correct. While we do not give the Board's conclusions the weight of a jury verdict, we will sustain those conclusions unless it appears they are not justified by a reasonable view of the evidence or are contrary to law.

Williams v. Virginia State Bar, 261 Va. 258, 264, 542 S.E.2d 385, 389 (2001) (citations omitted). A violation of disciplinary rules must be established by clear proof. *See, e.g., Blue v. Seventh Dist. Comm.,* 220 Va. 1056, 1062, 265 S.E.2d 753, 757. We separately review each of the alleged Rule violations below.

I. Rule 4.3(b)

Timothy M. Barrett and Valerie Jill Rhudy were married in 1990. Barrett was admitted to practice law in the Commonwealth of Virginia in 1996 and operates as a sole practitioner in the City of Virginia Beach. Rhudy served as his secretary during their marriage.

In the summer of 2001, Barrett and Rhudy separated. She took the couple's six children and moved from the marital home in Virginia Beach to her parents' home in Grayson County.

Rule 4.3(b) provides as follows:

A lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interest of the client.

The Board found that Barrett violated this rule because it concluded certain statements in two electronic mail ("e-mail") communications he wrote to Rhudy after the separation, but before she retained counsel, constituted legal

advice. On July 25, 2001, Barrett sent an e-mail to Rhudy containing the following:

Venue will not be had in Grayson County. Virginia law is clear that venue is in Virginia Beach.

. . . . .

Under the doctrine of imputed income, the Court will have to look at your skills and experience and determine their value in the marketplace.... You can easily get a job ... [making] $2,165.00 per month.... In light of the fact that you are living with your parents and have no expenses ... this income will be more than sufficient to meet your needs. I ... just make enough to pay my own bills ... Thus, it is unlikely that you will ... obtain spousal support from me.

I ... will file for ... spousal support to have you help me pay you [sic] fair share of our $200,000+ indebtedness. Since I

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am barely making it on my income and you have income to spare, you might end up paying me spousal support....

In light of the fact that ... I ... am staying in the maritial [sic] home ... I believe that I will obtain the children.... [Y]ou will have to get a job to pay me my spousal support.... The Court will prefer the children staying with a [parent], ... there is no question that I can set up a home away from home and even continue to home school our kids. Therefore, it is likely that you will lose this fight. And of course, if I have the kids you will be paying me child support....

I am prepared for the fight.

("July e-mail").

Barrett sent Rhudy another e-mail on September 12, 2001, in which he included the following:[2]

I will avail myself of every substantive law and procedural and evidentiary rule in the books for which a good faith claim exists. This means that you, the kids and your attorney will be in Court in Virginia Beach weekly... [Y]ou are looking at attorney's expenses that will greatly exceed $10,000.... I will also appeal ... every negative ruling ... causing your costs to likely exceed $30,000.00....

You have no case against me for adultery.... [The facts] show[] that you deserted me.... [Y]our e-mails ... show ... that you were cruel to me. This means that I will obtain a divorce from you on fault grounds, which means you can say goodbye to spousal support....

I remain in the marrital [sic] home ... I have all the kids [sic] toys and property, that your parents' home is grossly insufficient for the children, that I can home school the older kids while watching the younger whereas you will have to put the younger in day care to fulfill your duty to financially support the kids, I believe that I will get the kids no problem....

[T]he family debt ... is subject to equitable distribution, which means you could be socked with half my lawschool [sic] debt, half the credit care [sic] debt, have [sic] my firm debt, etc.

("September e-mail").

The foregoing e-mail passages were interwoven with many requests from Barrett to Rhudy to return home, professing his love for her and the children and exhorting Rhudy for reasons of faith to reunite the family because it was God's will. For example, the September e-mail included the following:

You know that it is God's will that we be reconciled.... I am begging you again to forgive me as God forgives you, to give me that 1000th chance He gave you today, to start over with me with a clean slate, to come home.

In finding that Barrett gave unauthorized legal advice to an unrepresented person in violation of Rule 4.3(b), the Board opined that "Barrett cannot send those two e-mails stating

what he did." Barrett contends that Rule 4.3(b) was not meant to bar communications between a husband and wife, and that construing it as such interferes with the sanctity of marriage. He further contends the e-mails only stated his opinions and were not advice to Rhudy.

Prior decisions of the Board reveal that conduct usually found to be in violation of Rule 4:3(b) is much more egregious than Barrett's conduct in this case. In October 1990, the Board entered an order suspending the license of Grant Paul Jones. *In re Jones,* VSB Docket No. 87-070-1177 (Oct. 17, 1990).[3] The Board found that Jones had provided family counseling to the complainant's family through his church. Complainant's exhusband was charged with incest and Jones agreed to represent him on the criminal charge. Jones paid an unannounced visit to the complainant and her daughter, and without disclosing that he represented the father in the criminal proceedings, he held a

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"counseling" session with them, designed to elicit incriminating testimony. While this conduct unquestionably violated the Rules, the Board particularly found Jones in violation of former DR 7-103(A)(2), the predecessor of Rule 4.3(b), when he returned to the unrepresented complainant to advise her as to how she should respond to inquiries that might be directed at her concerning the "counseling" session.

While Jones did not appeal the Board's decision to this Court, we note that his conduct in that case was the type Rule 4.3(b) is intended to prohibit. Comment [1] to Rule 4.3 of the Virginia Rules of Professional Conduct cautions that "[a]n unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law."

Jones, without disclosing his representation of the husband, gave specific legal advice to an adverse party. The complainant had no reason to believe that Jones, who had also been her counselor, represented interests adverse to hers. In the case at bar, however, Barrett expressed only his opinion that he held a superior legal position on certain issues in controversy between himself and Rhudy. His statements may have been intimidating, but he did not purport to give legal advice. Rhudy knew that Barrett was a lawyer and that he had interests opposed to hers. We find that the concern articulated by the Comment to Rule 4.3 is not borne out in this case.

While the Bar argues that there is no "marital" exception to Rule 4.3(b), neither does it ask us to set out a per se rule that all communication by a lawyer, to his or her unrepresented spouse in a divorce proceeding discussing legal issues pertinent to the divorce, is prohibited under Rule 4.3(b). We do not find there is such a per se rule, but it is otherwise unnecessary for us to address that point because upon our independent review of the entire record, we find that there was not sufficient evidence to support the Board's finding that Barrett's e-mail statements to Rhudy were legal advice rather than statements of his opinion of their legal situation. Therefore, we will set aside the Board's finding that Barrett violated Rule 4.3(b).

II. Rule 3.4(j)

Rule 3.4(j) provides that a lawyer may not

[a]ssert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

The Board found Barrett in violation of Rule 3.4(j) based on his correspondence with Rhudy's attorney and his filing of motions without prior notice to the court, contrary to a prior court order. We will affirm the Board's disposition that Barrett violated Rule 3.4(j) by his harassing statements to Rhudy's attorney, but we do not find sufficient evidence to support the Board's finding that Barrett acted in violation of

the Rule by violating a trial court order requiring notification before filing motions.

In the fall of 2001, Rhudy retained Lanis L. Karnes to represent her in the divorce proceedings in Virginia Beach Circuit Court. For several months thereafter in numerous letters, Barrett wrote to Karnes but referred to her by her former married name of "Price." Barrett testified that he did not believe Karnes had the right to change her name based upon his religious beliefs. According to Barrett, referring to Karnes by her former husband's name was a way to honor Karnes' former husband. Barrett indicated to the Board's investigator that it was a means for him to protest Karnes' role as Rhudy's counsel. Additionally, Barrett's letters to Karnes contained the following comments:

Words cannot express the disappointment I feel towards you, one who ostensibly claims Christ as her savior, in that you would represent one Christian in their suit against another, let alone a wife verses [sic] a husband, in violation of the Word of God ... causing that Word to be defamed.... Shame on you.

Please pass on to your client the fact that it has not escaped my notice the irony that my wife, who just weeks ago was feigning

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contempt for the feminism of her friends, has retained one of the worst examples of "Christian" feminism ever to pollute the campus of Regent University. You two will make a lovely pair.

I look forward to hearing from you shortly as to the matters raised in this letter and seeing you this Friday for the beginning of what will be a series of hearings that will not conclude until the Virginia Supreme Court has passed on the matter of *Barrett v. Barrett.*

[Y]ou are inept.... I beg you to start zealously representing your client with competence and stop wasting her money and my time.

According to the commentary accompanying Rule 3.4(j), the Bar is concerned with "conduct that could harass or maliciously injure another" such that it "bring[s] the administration of justice into disrepute." Comment [6], Rule 3.4. Additional comments describe the conduct the Rule was designed to prohibit:

The duty of [a] lawyer to represent a client with zeal does not militate against his concurrent obligation to treat, with consideration, all persons involved in the legal process and to avoid the infliction of needless harm....

In adversary proceedings, clients are litigants and though ill feeling may exist between the clients, such ill feeling should not influence a lawyer's conduct, attitude or demeanor towards opposing counsel. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.

Comments [7]-[8], Rule 3.4.

Barrett's foregoing statements to Karnes did not address the legal issues in the divorce action, but personally attacked opposing counsel. Karnes testified that she found these comments to be "offensive and derogatory." By his own admission, Barrett referred to Karnes by her former married name "as a way of protest."

Barrett argues that Rule 3.4(j) does not apply to communications between lawyers, but merely addresses actions taken, not words used, in the litigation context. We disagree. A preponderance of authorities interpreting the model rule upon which former DR 7-102(A)(1) was based, and from which Rule 3.4(j) was derived, have found that harassing ad hominem attacks on opposing counsel are prohibited under the Rule. *See, e.g., Thomas v. Tenneco Packaging Co.,* 293 F.3d 1306, 1323 (11th Cir.2002); *In re Vollintine,* 673 P.2d 755, 758-59 (Alaska 1983).

We agree with the Supreme Court of Kansas that

[a]ttorneys are required to act with common courtesy and civility at all times in their dealings with those concerned with the legal process.... An attorney who exhibits the lack of civility, good manners and common courtesy ... tarnishes the entire image of what the bar stands for.

In re Gershater, 17 P.3d 929, 935-36 (Kan. 2001) (citations omitted). There is sufficient evidence in the record to support the Board's finding that Barrett's comments to Karnes were "other action" under Rule 3.4(j) meant to harass her in her capacity as Rhudy's attorney.

However, we find that the Board erred in determining a violation of Rule 3.4(j) on the basis of motions alleged to have been filed without first notifying the trial court, in violation of a prior order. On January 24, 2002, Judge H. Thomas Padrick, Jr., of the Virginia Beach Circuit Court, entered an order requiring Barrett and Karnes to "arrange a conference call with the Court to discuss any relevant issue," and that this was to be done "prior to filing a motion." The Board found that despite this order, Barrett "attempted to file numerous motions in a hearing before Judge Shockley of the Circuit Court of the City of Virginia Beach without any prior conference call with the court."

There are no motions in the record dated after Judge Padrick's January 24, 2002, order. The only evidence to substantiate the Board's finding is Karnes' testimony that Barrett "tried to circumvent that order and began filing things with Judge Shockley."

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There is nothing in the record to show what "things" Barrett is alleged to have filed or how the "things" violated Judge Padrick's order. The record contains no evidence that any alleged action by Barrett in violation of the order was ever brought to the attention of the trial court.

Without actual proof of the motions filed in violation of the order, we cannot agree that the Board's finding that Barrett violated Rule 3.4(j) on this ground is "justified by a reasonable view of the evidence." *Williams,* 261 Va. at 264, 542 S.E.2d at 389. Because we find that there was sufficient evidence that Barrett intended to harass Karnes, we will approve the Board's determination of misconduct under Rule 3.4(j) on that ground, but will set aside that portion of the Board's Order under that Rule which was based on violating Judge Padrick's order of January 24, 2002.

III. Rule 3.4(i)

The Board found Barrett violated Rule 3.4(i), which prohibits lawyers from "present[ing] or threaten[ing] to present criminal or disciplinary charges solely to obtain an advantage in a civil matter." In the course of his correspondence with Karnes, Barrett threatened her with a disciplinary complaint or sanctions four times.

I also ask that you stop attempting to deceive the court in your pleadings .... [T]his conduct violates Rule 3.3 of the Rules of Professional Conduct. If you insist on continuing this unethical conduct, I will seek to have you disbarred.

Should you continue to present motions that lack a firm foundation in the law and display an utter lack of proofreading, I will continue to file for sanctions pursuant to Section 8.01-271.1 of the Code of Virginia.

[S]hould you not immediately begin to proofread your letters/pleadings to insure [sic] both textual accuracy and legal faithfulness, I will report you the Virginia State Bar for your violation of Rule 1.1 of the Rules of Professional Conduct. [sic]

Please send me a letter informing me as to how you can ethically justify charging your client for the time you will be traveling across the states of Virginia and Tennessee instead of advising her to retain local counsel? [sic] I ask since your conduct appears to be in violation of

Rule 1.5 of the Rules of Professional Conduct as to the reasonableness of fees.

Barrett testified that he believed "typographical errors are a basis for a Bar complaint." While he did not file a complaint against Karnes, he did make a motion for sanctions based on typographical errors, which was denied. Barrett argues, however, that these "threats" were not made "solely to obtain an advantage in a civil matter." We disagree.

We find that the succession of threats without a good faith basis supports the Board's conclusion that Barrett made these statements "solely to obtain an advantage" in his divorce proceeding. It is clear from Barrett's letters that his motivation in threatening Karnes with sanctions and disciplinary complaints was to force her to withdraw from representing Rhudy. Barrett admits as much in letters to Karnes:

I did indirectly threaten you with a malpractice action over the incompetent way you have handled this matter thus far. I did this to encourage [Rhudy] that she can retrieve from you the money she has wasted on your services to date and to save me from her appeal on the basis of inadequacy of counsel.

I ask that you either familiarize yourself with this area of the law and present pleading [sic] that are in conformity with the law or comply with your duties under Rule 1.1 and withdraw as counsel in this matter.

Please advise [Rhudy] not to call me again unless she has terminated you.

Indeed, Barrett testified that he "was terribly upset that Ms. Barrett had gotten Ms. Karnes involved in [the] case" because he "knew that Ms. Karnes had it in for [him]." Thus, we find the evidence sufficient to support the Board's finding that Barrett threatened Karnes with disciplinary complaints in order to obtain an advantage in the divorce and custody proceedings in violation of Rule 3.4(i).

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IV. Rule 3.1

Rule 3.1 provides that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous." On October 19, 2001, Barrett filed a motion to strike the pleadings asserting that he did not know and was not married to the plaintiff, Valerie Jill Rhudy Barrett. Barrett asked that the pleadings be stricken, that the case be dismissed and that he be awarded costs. The motion was denied. Barrett testified before the Board that he filed the motion because "Valerie Jill Barrett is Jill's legal name, not Valerie Jill Rudy [sic] Barrett."

Barrett argues that the Board's Order of Suspension does not state a basis for determining that the motion was frivolous and that the filing of the motion was never specifically connected to the Board's conclusion that he violated Rule 3.1. Although the Board's Order does not directly tie the Rule 3.1 violation to the motion to strike the pleadings, we find that the record clearly supports a finding that Barrett violated the Rule.

Barrett's motion to strike the pleadings is the only pleading which the Bar argues proves its contention that he violated Rule 3.1. The Bar argued that Barrett clearly knew Rhudy's maiden name, and that Barrett himself used multiple versions of Rhudy's name in his own motions. This obviates Barrett's claim that he was concerned with consistency in the pleadings. Thus we find that the record supports the Board's finding that Barrett violated Rule 3.1.

V. Rule 3.5(e)

Rule 3.5(e) prohibits ex parte contact by lawyers with the court:

In an adversary proceeding, a lawyer shall not communicate ... as to the merits of the cause with a judge ... except: ... (2) in writing if the lawyer promptly delivers a copy of the writing to opposing counsel.

On April 2, 2002, Barrett sent a letter to Judge Padrick arguing that Rhudy was unfit to

have custody of the children and that he should be awarded custody. The letter indicates that copies were sent to the children's court-appointed psychologist and the guardian ad litem. There is no indication that the letter was sent to Karnes. Karnes testified that she first became aware of the letter after a telephone call from the court.

Barrett's counsel admitted to the Board that he could not "say categorically that [Barrett] sent [the] letter to [Karnes]." On appeal, Barrett declined to ask this Court to set aside the Board's finding as to his violation of Rule 3.5(e). Thus, we will affirm the Board's finding that Barrett violated Rule 3.5(e) for an ex parte communication with the trial court.

VI. Rule 8.4(b)

In November 2001, Judge Shockley entered an order in the Virginia Beach Circuit Court requiring Barrett to pay $1704 per month in child support. In February 2002, Judge Padrick entered another order requiring Barrett to pay Rhudy $1000 per month in spousal support. Between November 2001 and July 2004, Barrett missed ten payments and made six payments in amounts less than the monthly amount due. When Barrett did make payments, he often paid in excess of the monthly amount due in order to make up arrearages. Barrett testified that he "paid when [he] had the ability" and that he never had "a willful desire to [disregard the child support order]."

On August 14, 2002, Judge Padrick found Barrett in contempt of court for failure to timely pay his support obligations. On March 24, 2003, Judge Tompkins of the Grayson County Juvenile and Domestic Relations District Court also held Barrett in contempt for failure to pay child support. Both contempt orders sentenced Barrett to confinement in jail, but were suspended upon condition he pay the arrearages. On the basis of these two contempt charges, the Board found Barrett in violation of Rule 8.4(b).[4] In so finding, the Board cited Barrett's ability to make $900 monthly payments

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on a new Corvette sports car from October 2001 through April 2004 and his representation that he would lose $1400 per day if he had "to travel from Virginia Beach to Grayson County for court proceedings."

Rule 8.4(b) states that "[i]t is professional misconduct for a lawyer to: ... commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law." Barrett maintains that a finding of contempt for failure to meet his support obligations does not constitute a criminal act in this case, was not a deliberately wrongful act and does not necessarily reflect adversely on his honesty, trustworthiness or fitness to practice law.

In response, the Bar cites Code § 63.2-1937, which includes lawyers in the class of state-licensed professionals who can lose their licenses for failing to pay child support. Thus, the Bar argues that consistency with the statutory obligations requires a finding that Barrett's failure to meet his support obligations in conjunction with his ownership of the Corvette was a deliberate, wrongful act reflecting adversely on his trustworthiness and fitness to practice law.

There is nothing in the record to show Barrett was guilty of criminal contempt as opposed to civil contempt. Thus, we must examine the record to determine whether, in this case, the Bar proved that Barrett's contempt convictions were the result of a "deliberately wrongful act," i.e. disregarding his obligation to pay child support, which reflects adversely on his honesty, trustworthiness and fitness to practice law. We find that connection lacking on this record.

Barrett testified that he purchased the Corvette in October of 2001, a month before his support obligations began, and then unsuccessfully attempted to sell the car. He also missed several car payments, and maintains that

he never missed a support payment so he could make a car payment.

Barrett also argues that his representation that he would lose $1400 per day if he were compelled to attend court proceedings in Grayson County, was not based on actual earnings, but on his billable rate of $175.00 per hour over an eight hour day, although he primarily operates on a contingent fee basis. The Bar presented no evidence that Barrett earned $1400 daily, or what law practice expenses would be paid from such earnings. Barrett provided the only evidence as to his financial situation. Thus, we find that there is no basis for the Board's reliance on the supposition that Barrett had the ability to pay his support obligations because he earned $1400 per day.

The Bar presented no evidence that Barrett's failure to pay child and spousal support was willful or intentional. Barrett showed that he made payments when he settled cases and received his contingency fee, which is the nature of his law practice. He also maintained that he never made payments on the promissory note he obtained to purchase the Corvette when he could not make his support payments. Barrett also testified he tried to sell the Corvette but "could not liquidate it for whatever [he] owed on it." To make his support payments, Barrett had to borrow money from his grandmother. Eventually, Barrett filed for bankruptcy. The Bar presents no evidence to the contrary. Thus, we do not find sufficient evidence in the record to support a finding by the Board of a "deliberately wrongful act" within the meaning of Rule 8.4(b).

Further, the Bar did not establish a nexus between the failure to pay child support and Barrett's fitness to practice law. Instead the Bar relied upon conclusory statements:

[I]n terms of relating [the contempt charge] to Mr. Barrett as an attorney, the contempt finding is a finding ... that he could have ... abided by a court order and failed to do so. Surely that reflects on his fitness to practice, if not his trustworthiness.

The required nexus between the contempt convictions and Barrett's honesty, trustworthiness and fitness to practice law has not been established by these conclusory statements. We will therefore set aside the finding of the Board that Barrett violated Rule 8.4(b).

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VII. Conclusion

The Board's suspension order of Barrett's license to practice law for three years was based on Barrett's violations of Rule 3.1, Rule 3.4(i), Rule 3.4(j), Rule 3.5(e), Rule 4.3(b), and Rule 8.4(b). For the reasons set forth above, we will set aside the Board's determination that Barrett violated Rule 4.3(b), Rule 8.4(b), and Rule 3.4(j), in part. We will affirm that portion of the Board's Order that Barrett violated Rule 3.1, Rule 3.4(i), Rule 3.5(e), and Rule 3.4(j), in part.

Accordingly, the Order of the Board, dated August 5, 2004, will be affirmed in part, reversed in part, and the case will be remanded for reconsideration of any sanction for Barrett's violations of Rule 3.1, Rule 3.4(i), Rule 3.5(e), and Rule 3.4(j), in part.

Affirmed in part, reversed in part, and remanded.

Notes:

1. The Board dismissed charges that Barrett violated Rules 4.2 and 4.4.

2. On July 30, 2001, Rhudy retained attorney Karen Loftin of Galax, Virginia to represent her, but Loftin notified Barrett that she had withdrawn from representation on August 10, 2001.

3. This order became the subject of a District of Columbia Court of Appeals case in which that Court reviewed the Board's decision to determine if reciprocal sanctions were warranted against Jones in the District of Columbia. *See In re Jones,* 599 A.2d 1145, 1147-48 (D.C.1991).

4. On argument before this Court, the Bar conceded that it did not seek a rule that contempt of court for failure to pay child support is per se a violation of Rule 8.4(b). We do not find there is such a per se rule, but it is unnecessary to further address that point because we resolve the issue of violating Rule 8.4(b) on other grounds.

Justice KEENAN, with whom Chief Justice HASSELL and Senior Justice COMPTON join, concurring in part and dissenting in part.

I respectfully dissent from the majority's holding that Barrett did not violate Rule 4.3(b). In my opinion, the majority's holding effectively creates a "spousal exception" to the Rule and permits a lawyer to engage in otherwise prohibited conduct dispensing legal advice as long as the lawyer's spouse, rather than an unrelated person, is the affected pro se party. I also dissent from the majority's holding that Barrett did not violate Rule 8.4(b) which, among other things, recognizes as professional misconduct any deliberately wrongful act that reflects on a lawyer's trustworthiness. I would hold that Barrett violated this Rule by twice being held in contempt of court for nonpayment of court-ordered support. I concur in the balance of the majority's opinion.

In reaching its conclusion that Barrett did not violate Rule 4.3(b), the majority states that Barrett "did not purport to give [his wife] legal advice." A brief review, however, of the statements considered by the majority leads me to the opposite conclusion.

In his statements to his estranged wife, Barrett advised her that under Virginia law, all court proceedings would be held in Virginia Beach. With regard to the issue of spousal support, Barrett explained that the court would employ the legal doctrine of imputed income to determine the value of her skills and experience "in the marketplace."

Barrett further stated that "spousal support is based on the maxim [of] ... the needs of the one versus the other's ability to pay." Citing facts relating to the parties' situation, Barrett then offered his judgment that it was "unlikely" that his wife would be able to obtain court-ordered support. With regard to the issue of child custody, Barrett told his wife that the "court will prefer the children staying with a [parent]," rather than with a substitute caregiver during working hours.

I would hold that these explanations constituted legal advice intended to influence the conduct of a party who had conflicting legal interests and who was not represented by counsel. Without question, Barrett's conduct would have been a violation of Rule 4.3(b) had he communicated this advice to a pro se litigant whose spouse Barrett was representing. Thus, the majority's conclusion necessarily implies that there is a "spousal exception" to Rule 4.3(b), under which an attorney may attempt to influence his or her spouse's conduct by imparting legal advice in a harassing manner regarding the parties' conflicting legal interests.

Such a conclusion, however, is contrary to the plain language of Rule 4.3(b), which provides no "spousal exception." Moreover, Barrett's use of legal advice as a "sword" in his marital conflict is clearly a type of conduct that Rule 4.3(b) is designed to discourage. It is hard to imagine a situation in which an attorney would be in a stronger position to improperly influence another's conduct by giving legal advice.

With regard to Barrett's alleged violation of Rule 8.4(b), the majority states that the Bar "presented no evidence that Barrett's failure to pay child and spousal support was willful or intentional." The majority fails to explain why findings by two judges, holding Barrett in contempt of court and imposing suspended jail sentences for his failure to comply with court orders, is not evidence of

deliberately wrongful conduct reflecting adversely on Barrett's trustworthiness.

Contempt findings manifest more than a mere arrearage in court-ordered support payments, which can result even when a person is doing everything possible to comply with a court order. The contempt findings and suspended jail sentences imposed in Barrett's case necessarily reflect the judges' conclusions Barrett was not diligently attempting to meet his support obligations, and that his explanations for failing to do so were incredible or otherwise unacceptable. I would hold that these repeated contempt findings are sufficient evidence to support the Board's conclusion that Barrett violated Rule 8.4(b).

Therefore, I would conclude that the Bar's findings that Barrett violated Rules 4.3(b) and 8.4(b) are supported by a reasonable view of the evidence and are in accordance with the law. *See Williams v. Virginia State Bar,* 261 Va. 258, 264, 542 S.E.2d 385, 389 (2001); *Myers v. Virginia State Bar,* 226 Va. 630, 632, 312 S.E.2d 286, 287 (1984).

1 of 1 DOCUMENT

Code of Virginia

*** Rules Amendments received by the Publisher from Virginia Supreme Court through November 1, 2012. ***
*** Remaining Rules current through October 5, 2012.***
*** Annotations current for Cases Received by October 13, 2012. ***

RULES OF SUPREME COURT OF VIRGINIA
PART SIX INTEGRATION OF THE STATE BAR
SECTION II. VIRGINIA RULES OF PROFESSIONAL CONDUCT
ADVOCATE

Va. Sup. Ct. R. pt. 6, sec. II, 3.4 (2012)

Review Court Orders which may amend this Rule.

Rule 3.4. Fairness To Opposing Party And Counsel

A lawyer shall not:

(a) Obstruct another party's access to evidence or alter, destroy or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party's access to evidence. A lawyer shall not counsel or assist another person to do any such act.

(b) Advise or cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein.

(c) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law. But a lawyer may advance, guarantee, or pay:

(1) reasonable expenses incurred by a witness in attending or testifying;

(2) reasonable compensation to a witness for lost earnings as a result of attending or testifying;

(3) a reasonable fee for the professional services of an expert witness.

(d) Knowingly disobey or advise a client to disregard a standing rule or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take steps, in good faith, to test the validity of such rule or ruling.

(e) Make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.

(f) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

(g) Intentionally or habitually violate any established rule of procedure or of evidence, where such conduct is disruptive of the proceedings.

(h) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the information is relevant in a pending civil matter;

(2) the person in a civil matter is a relative or a current or former employee or other agent of a client; and

(3) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

(i) Present or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.

(j) File a suit, initiate criminal charges, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

NOTES: [1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Paragraph (a) applies to evidentiary material generally, including computerized information.

[3] With regard to paragraph (c), it is not improper to pay a witness's reasonable expenses or to pay a reasonable fee for the services of an expert witness. The common law rule is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

[3a] The legal system depends upon voluntary compliance with court rules and rulings in order to function effectively. Thus, a lawyer generally is not justified in consciously violating such rules or rulings. However, paragraph (d) allows a lawyer to take measures necessary to test the validity of a rule or ruling, including open disobedience. See also Rule 1.2(c).

[4] Paragraph (g) prohibits lawyers from requesting persons other than clients to refrain from voluntarily giving relevant information. The Rule contains an exception permitting lawyers to advise current or former employees or other agents of a client to refrain from giving information to another party, because such persons may identify their interests with those of the client. The exception is limited to civil matters because of concerns with allegations of obstruction of justice (including perceived intimidation of witnesses) that could be made in a criminal investigation and prosecution. See also Rule 4.2.

1 of 1 DOCUMENT

Code of Virginia

*** Rules Amendments received by the Publisher from Virginia Supreme Court through November 1, 2012. ***
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RULES OF SUPREME COURT OF VIRGINIA
PART SIX INTEGRATION OF THE STATE BAR
SECTION II. VIRGINIA RULES OF PROFESSIONAL CONDUCT
ADVOCATE

Va. Sup. Ct. R. pt. 6, sec. II, 3.1 (2012)

Review Court Orders which may amend this Rule.

Rule 3.1. Meritorious Claims And Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

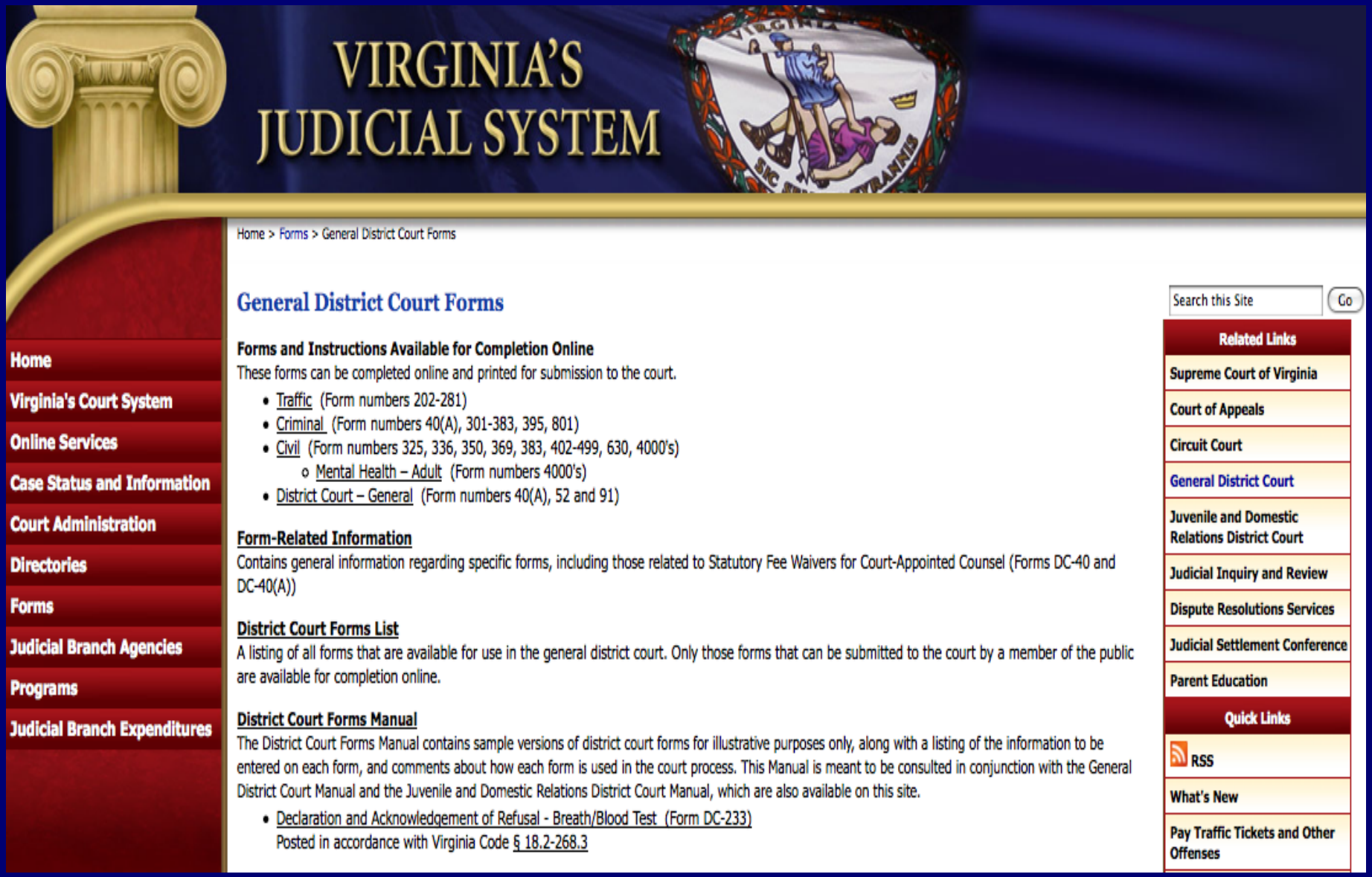
NOTES: [1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and is never static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person, or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

Virginia Code Comparison

Rule 3.1 is similar to DR 7-102(A)(1), but with three differences. First, the test of improper conduct is changed from "merely to harass or maliciously injure another" to the requirement that there be a basis for the litigation measure involved that is "not frivolous." This includes the concept stated in DR 7- 102(A)(2) that a lawyer may advance a claim

General District Court Forms



Eastern District of Virginia Handbooks

Eastern District of Virginia Handbooks

Richmond

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

INFORMATION ON REPRESENTING
YOURSELF (PRO SE)
IN A CIVIL ACTION

Norfolk/Newport News

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk/Newport News Division

INFORMATION ON REPRESENTING
YOURSELF (PRO SE)
IN A CIVIL ACTION

Eastern District of Virginia Handbook: Alexandria

UNITED STATES DISTRICT COURT
For the Eastern District of Virginia
Alexandria Division

Pro Se Reference Handbook

April 26, 2010

UNITED STATES DISTRICT COURT

For the Eastern District of Virginia

Alexandria Division

Pro Se Reference Handbook

Introduction

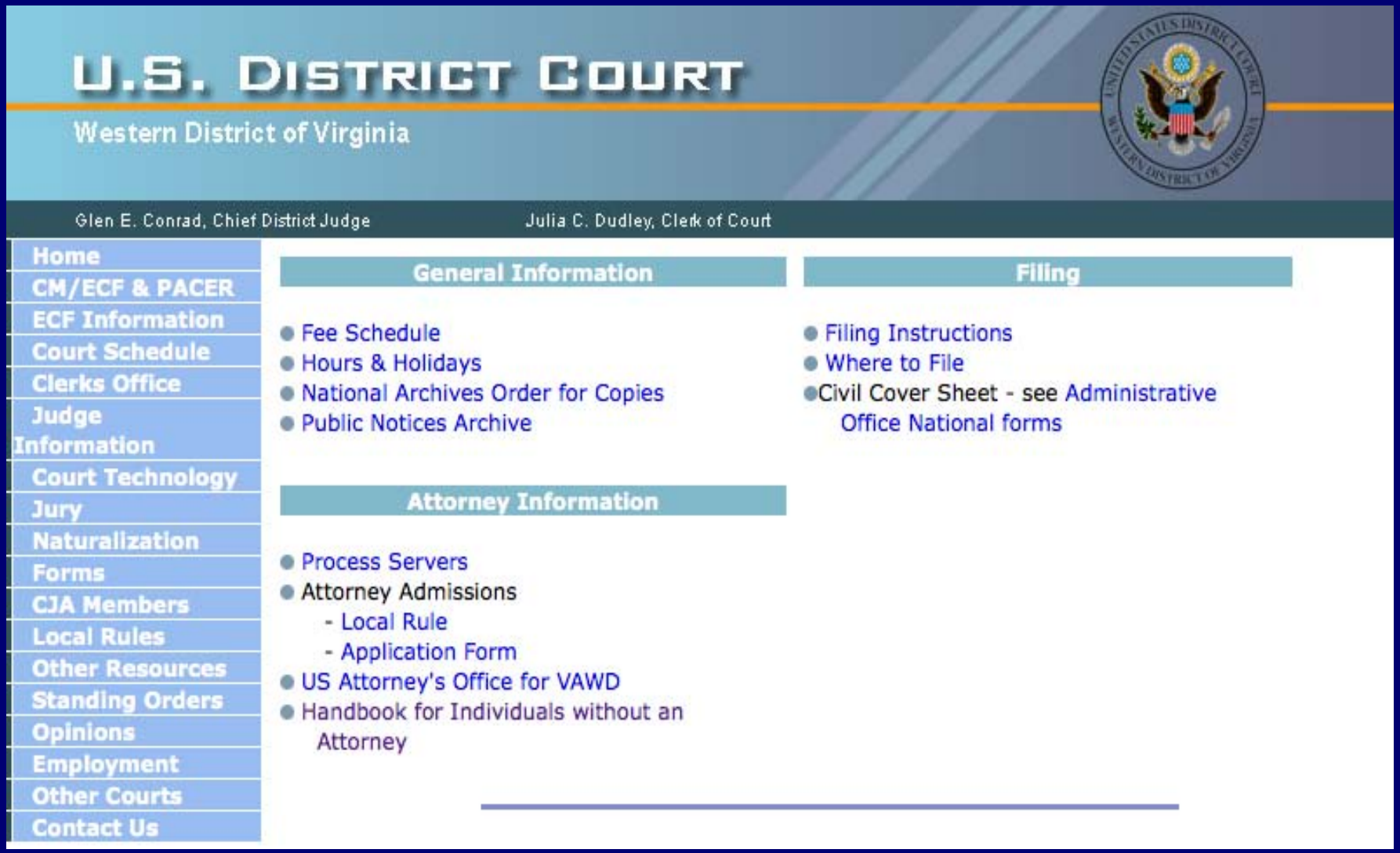
Welcome to the United States District Court for the Eastern District of Virginia. The Eastern District of Virginia consists of four divisions: Alexandria, Norfolk, Richmond, and Newport News.

The following instructions have been compiled to assist any person wishing to represent themselves (pro se) in a civil action in the Alexandria Division. These procedures do not satisfy all needs, nor is this handbook a substitute for legal representation. The information contained herein is not legal advice.

Contents

This handbook contains the following topics:

Western District of Virginia Handbook



Western District of Virginia Handbook

PRO SE HANDBOOK

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF VIRGINIA

Last Revised February 2008

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Richmond Bar Association

THE BAR ASSOCIATION
OF THE CITY OF RICHMOND

- About the Bar
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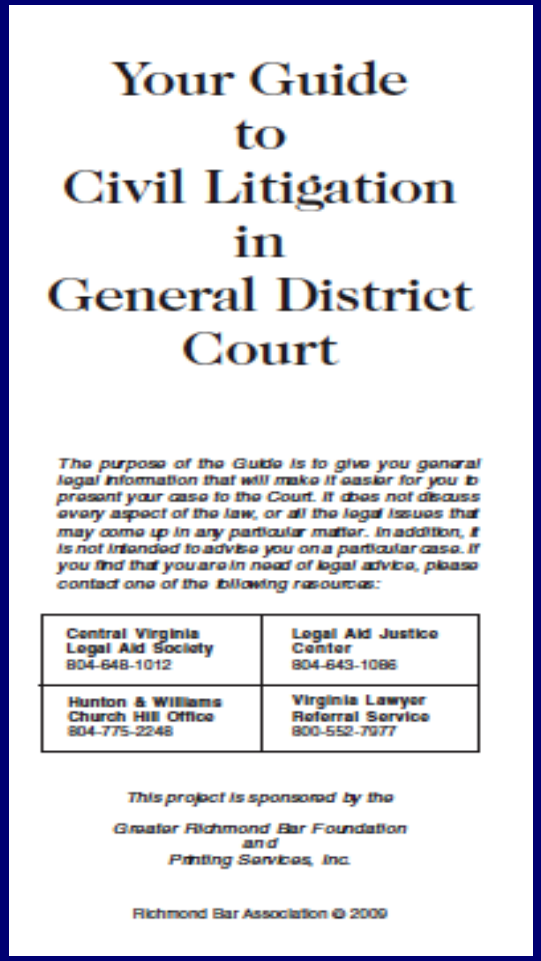
Richmond Bar Brochures

Pro Se Litigant Project

The Richmond Bar's Pro Se Litigant Project addresses the special needs of the ever-growing pro se litigant population. The pamphlet, "Your Guide to Civil Litigation in General District Court," will help pro se litigants understand the basic rules and procedures of civil litigation in the General District Court, from how to file a case to obtaining a judgment. (Spanish version)

An additional pamphlet, "Your Guide to Landlord-Tenant Disputes," has also been published to assist pro se litigants with landlord-tenant disputes. (Spanish version)

Richmond Bar Association's Pro Se Litigant Project Brochure



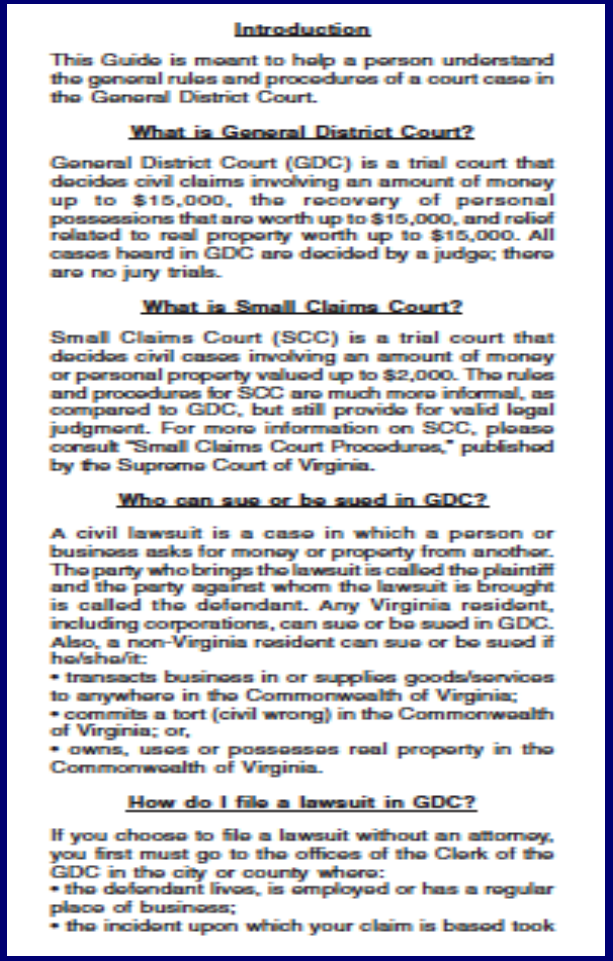
Your Guide
to
Civil Litigation
in
General District
Court

The purpose of the Guide is to give you general legal information that will make it easier for you to present your case to the Court. It does not discuss every aspect of the law, or all the legal issues that may come up in any particular matter. In addition, it is not intended to advise you on a particular case. If you find that you are in need of legal advice, please contact one of the following resources:

Central Virginia Legal Aid Society 804-648-1012	**Legal Aid Justice Center** 804-643-1086
Hunton & Williams Church Hill Office 804-775-2248	**Virginia Lawyer Referral Service** 800-552-7977

This project is sponsored by the

Greater Richmond Bar Foundation
and
Printing Services, Inc.



Introduction

This Guide is meant to help a person understand the general rules and procedures of a court case in the General District Court.

What is General District Court?

General District Court (GDC) is a trial court that decides civil claims involving an amount of money up to $15,000, the recovery of personal possessions that are worth up to $15,000, and relief related to real property worth up to $15,000. All cases heard in GDC are decided by a judge; there are no jury trials.

What is Small Claims Court?

Small Claims Court (SCC) is a trial court that decides civil cases involving an amount of money or personal property valued up to $2,000. The rules and procedures for SCC are much more informal, as compared to GDC, but still provide for valid legal judgment. For more information on SCC, please consult "Small Claims Court Procedures," published by the Supreme Court of Virginia.

Who can sue or be sued in GDC?

A civil lawsuit is a case in which a person or business asks for money or property from another. The party who brings the lawsuit is called the plaintiff and the party against whom the lawsuit is brought is called the defendant. Any Virginia resident, including corporations, can sue or be sued in GDC. Also, a non-Virginia resident can sue or be sued if he/she/it:

- transacts business in or supplies goods/services to anywhere in the Commonwealth of Virginia;
- commits a tort (civil wrong) in the Commonwealth of Virginia; or,
- owns, uses or possesses real property in the Commonwealth of Virginia.

How do I file a lawsuit in GDC?

If you choose to file a lawsuit without an attorney, you first must go to the offices of the Clerk of the GDC in the city or county where:

- the defendant lives, is employed or has a regular place of business;
- the incident upon which your claim is based took

Virginia Resources for Pro Se Litigants

Legal Resources

- Legal Services of Northern Virginia, (703) 684-5566
- Alexandria Bar Lawyers Referral, (703) 548-1105
- Alexandria Law Library, (703) 838-4077
- Virginia Law Referral Service, (800) 552-7977 or vsb.org
- Senior Law Center, Norfolk, VA (757) 627-3232

Legal Aid

- May file an Application to Proceed Without Prepayment and Affidavit
- VALegalAid.org
- Legal Aid Society of Eastern Virginia
- Central Virginia Legal Aid Society, (804) 648-1012
- 24-hour Legal Aid Helpline: 866-LEGL-AID

CALIFORNIA JUDICIAL BRANCH ONLINE SELF-HELP

CALIFORNIA COURTS
THE JUDICIAL BRANCH OF CALIFORNIA

Online Self-Help Center

Welcome, Self-Help will help you find assistance and information, work better with an attorney, and represent yourself in some legal matters. En español. More languages.

GETTING STARTED
- Finding Free and Low-Cost Legal Help
- Help From Your Court
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- Resolving Your Case Out of Court
- Preparing for Court
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- Bankruptcy

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- Cleaning Your Criminal Record
- Understanding Criminal Court

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APPEALS
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- Traffic (Infraction) Appeals

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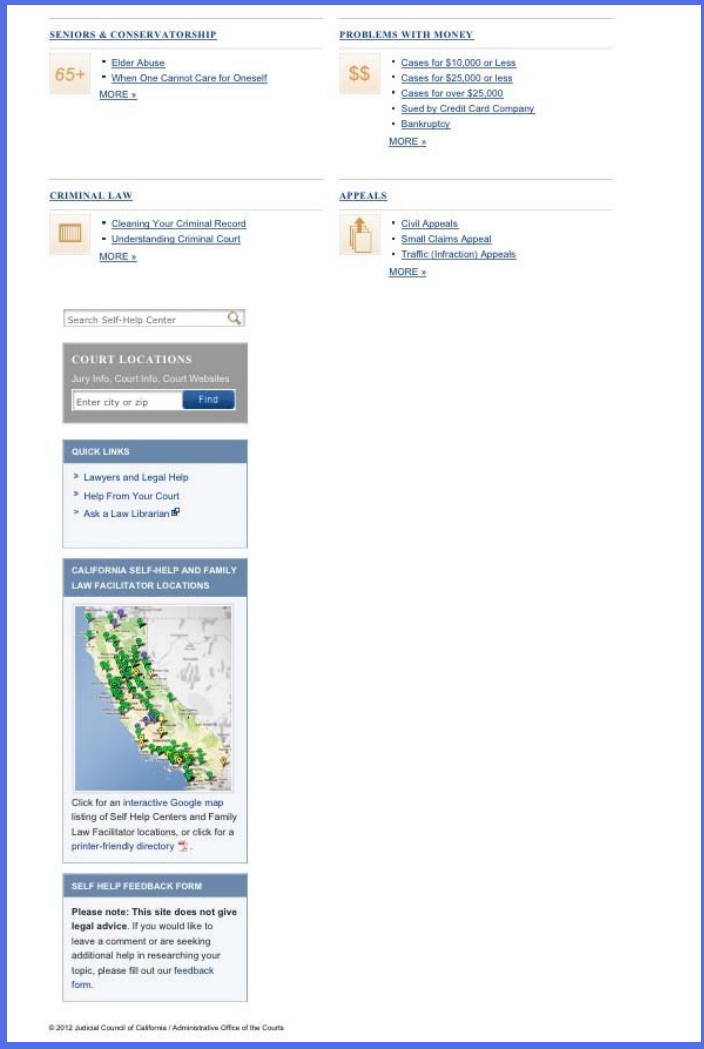

SENIORS & CONSERVATORSHIP
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MORE »

PROBLEMS WITH MONEY
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Search Self-Help Center

COURT LOCATIONS
Jury Info, Court Info, Court Websites
Enter city or zip — Find

QUICK LINKS
- Lawyers and Legal Help
- Help From Your Court
- Ask a Law Librarian

CALIFORNIA SELF-HELP AND FAMILY LAW FACILITATOR LOCATIONS

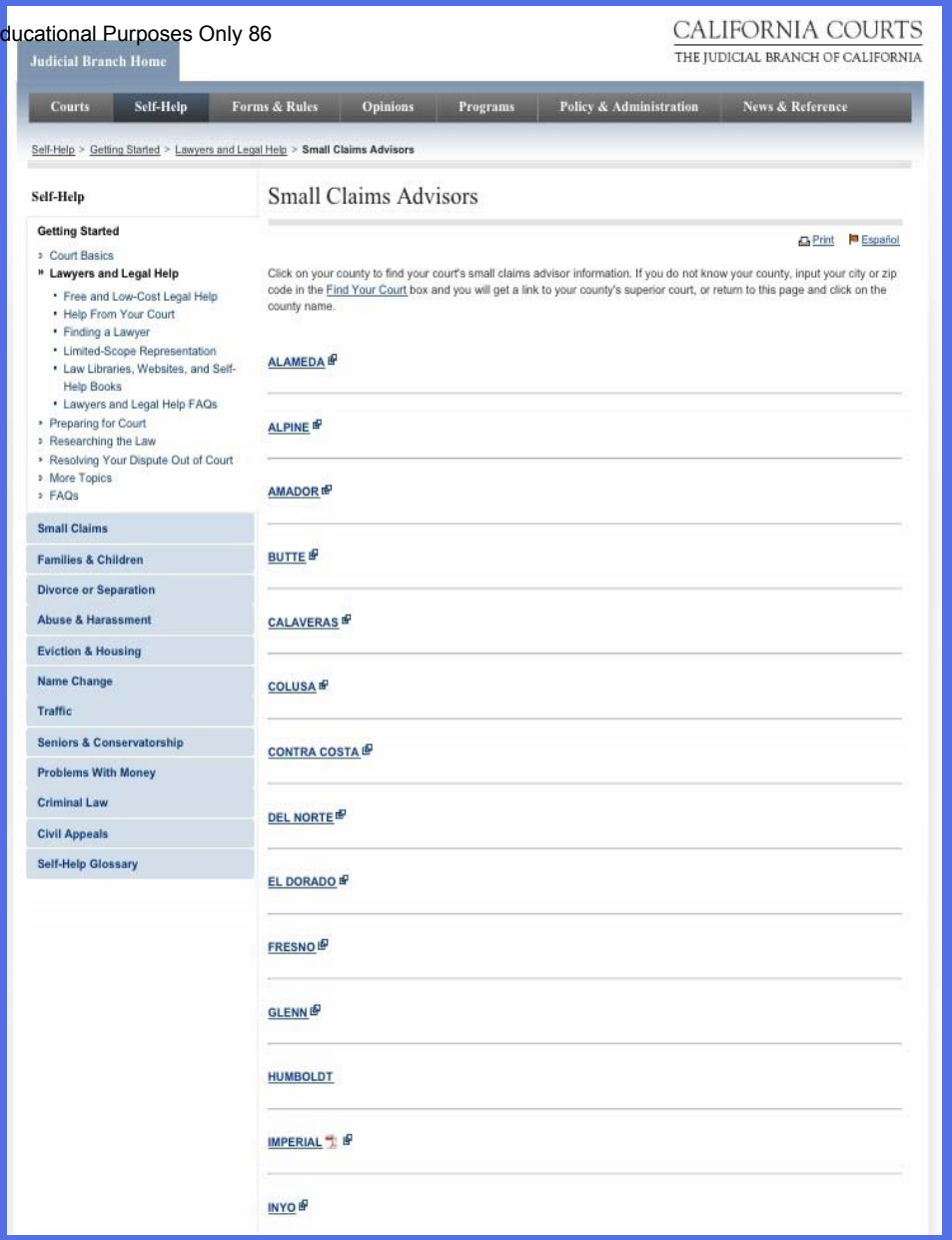
Click for an interactive Google map listing of Self Help Centers and Family Law Facilitator locations, or click for a printer-friendly directory.

SELF HELP FEEDBACK FORM

Please note: This site does not give legal advice. If you would like to leave a comment or are seeking additional help in researching your topic, please fill out our feedback form.

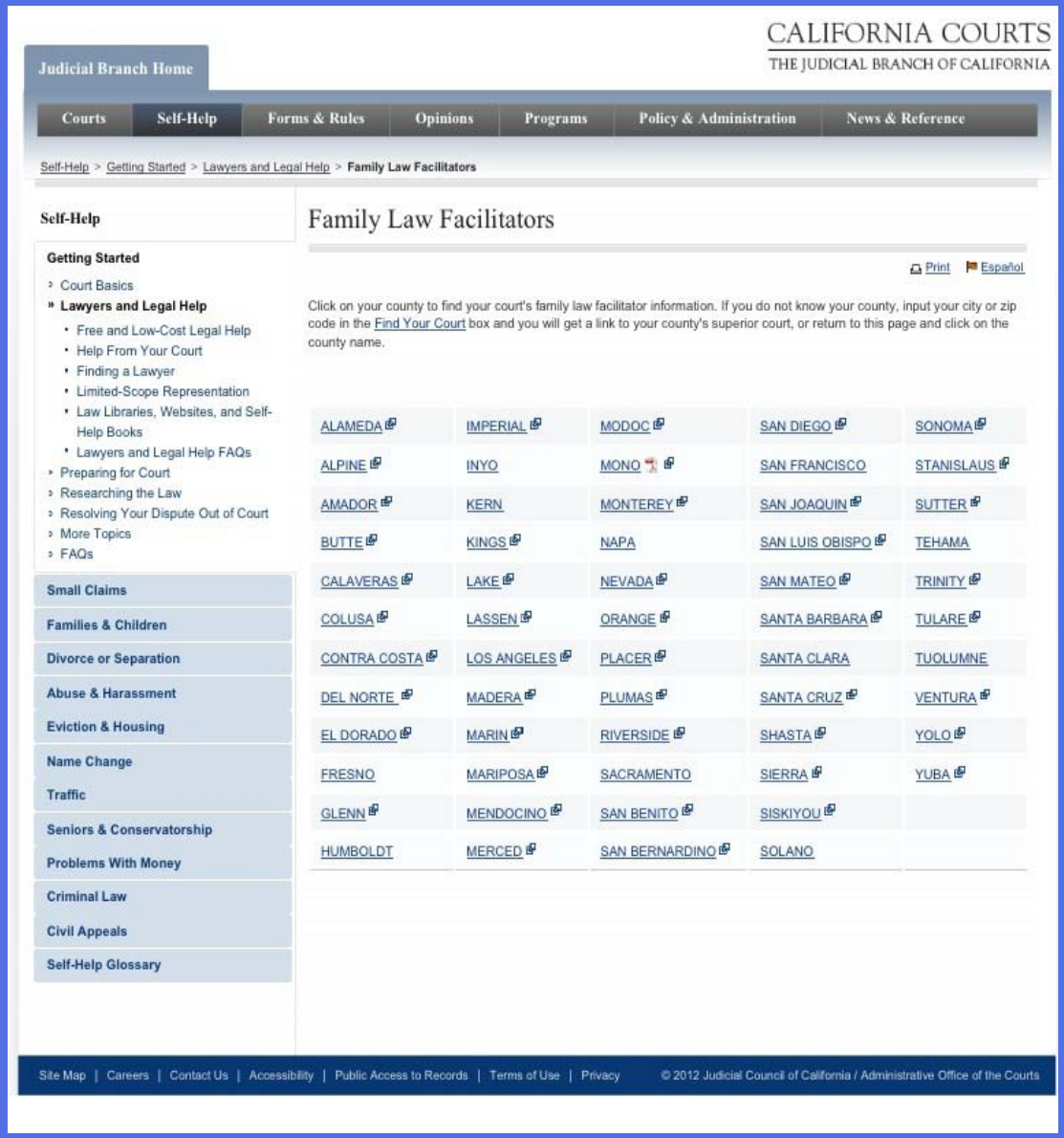
CALIFORNIA JUDICIAL BRANCH

- ONLINE SELF-HELP CENTER
  - LAWYERS & LEGAL HELP
    - SMALL CLAIMS ADVISORS



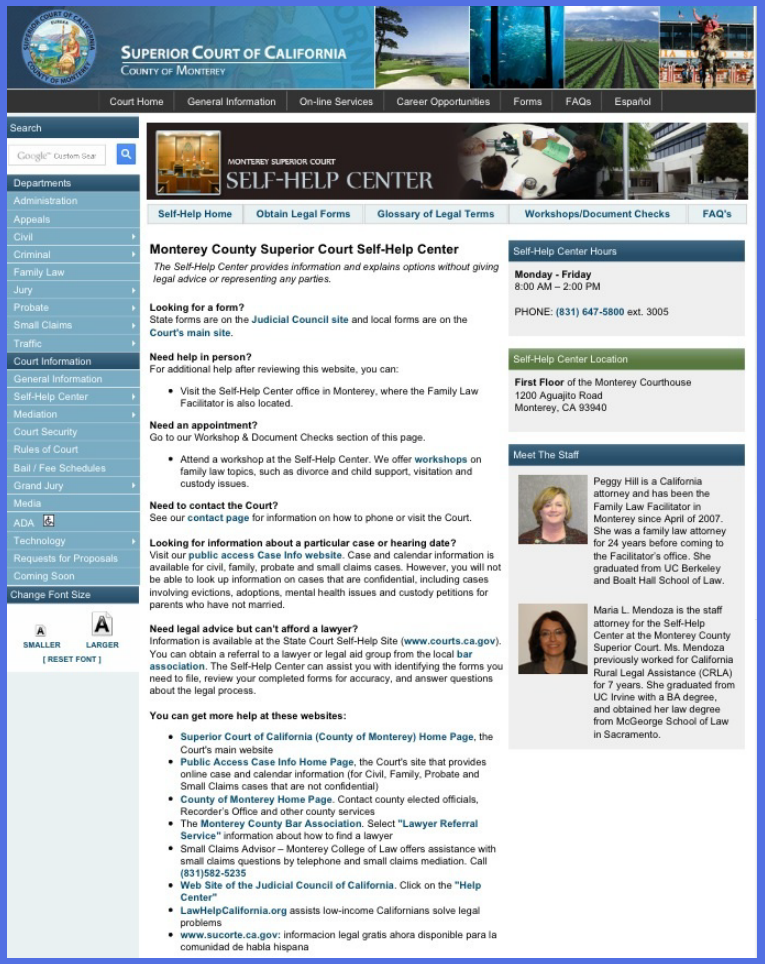
CALIFORNIA JUDICIAL BRANCH

- ONLINE SELF-HELP CENTER
  - LAWYERS & LEGAL HELP
    - FAMILY LAW FACILITATORS



CALIFORNIA SUPERIOR COURT

MONTEREY COUNTY SELF-HELP CENTER



SUPERIOR COURT OF CALIFORNIA
COUNTY OF MONTEREY

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MONTEREY SUPERIOR COURT
SELF-HELP CENTER

Self-Help Home | Obtain Legal Forms | Glossary of Legal Terms | Workshops/Document Checks | FAQ's

Monterey County Superior Court Self-Help Center

The Self-Help Center provides information and explains options without giving legal advice or representing any parties.

Looking for a form?
State forms are on the **Judicial Council site** and local forms are on the **Court's main site**.

Need help in person?
For additional help after reviewing this website, you can:

- Visit the Self-Help Center office in Monterey, where the Family Law Facilitator is also located.

Need an appointment?
Go to our Workshop & Document Checks section of this page.

- Attend a workshop at the Self-Help Center. We offer **workshops** on family law topics, such as divorce and child support, visitation and custody issues.

Need to contact the Court?
See our **contact page** for information on how to phone or visit the Court.

Looking for information about a particular case or hearing date?
Visit our **public access Case Info website**. Case and calendar information is available for civil, family, probate and small claims cases. However, you will not be able to look up information on cases that are confidential, including cases involving evictions, adoptions, mental health issues and custody petitions for parents who have not married.

Need legal advice but can't afford a lawyer?
Information is available at the State Court Self-Help Site (**www.courts.ca.gov**). You can obtain a referral to a lawyer or legal aid group from the local **bar association**. The Self-Help Center can assist you with identifying the forms you need to file, review your completed forms for accuracy, and answer questions about the legal process.

You can get more help at these websites:

- **Superior Court of California (County of Monterey) Home Page**, the Court's main website
- **Public Access Case Info Home Page**, the Court's site that provides online case and calendar information (for Civil, Family, Probate and Small Claims cases that are not confidential)
- **County of Monterey Home Page**. Contact county elected officials, Recorder's Office and other county services
- The **Monterey County Bar Association**. Select **"Lawyer Referral Service"** information about how to find a lawyer
- Small Claims Advisor – Monterey College of Law offers assistance with small claims questions by telephone and small claims mediation. Call **(831)582-5235**
- **Web Site of the Judicial Council of California**. Click on the **"Help Center"**
- **LawHelpCalifornia.org** assists low-income Californians solve legal problems
- **www.sucorte.ca.gov**: informacion legal gratis ahora disponible para la comunidad de habla hispana

Self-Help Center Hours

Monday - Friday
8:00 AM – 2:00 PM

PHONE: **(831) 647-5800** ext. 3005

Self-Help Center Location

First Floor of the Monterey Courthouse
1200 Aguajito Road
Monterey, CA 93940

Meet The Staff

Peggy Hill is a California attorney and has been the Family Law Facilitator in Monterey since April of 2007. She was a family law attorney for 24 years before coming to the Facilitator's office. She graduated from UC Berkeley and Boalt Hall School of Law.

Maria L. Mendoza is the staff attorney for the Self-Help Center at the Monterey County Superior Court. Ms. Mendoza previously worked for California Rural Legal Assistance (CRLA) for 7 years. She graduated from UC Irvine with a BA degree, and obtained her law degree from McGeorge School of Law in Sacramento.

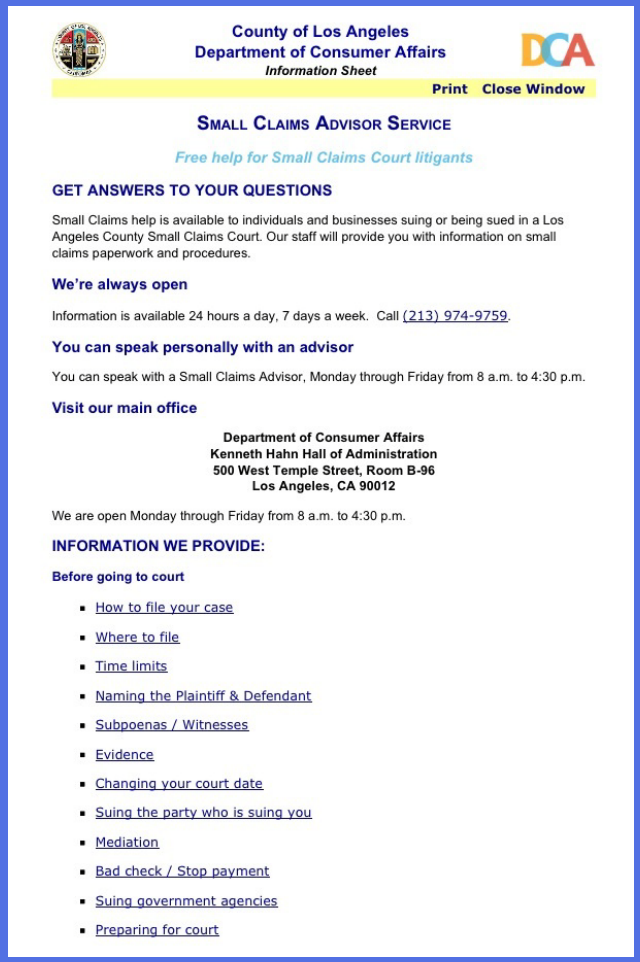
The Self-Help Center can help you with:

- Child Support Issues
- Paternity Issues, including Set Aside Motions
- Child Custody & Visitation
- Spousal Support
- Dissolutions (Divorce)
- Legal Separation/Annulment
- Domestic Partnerships
- Elder Abuse
- Domestic Violence
- Civil Harassment
- Probate Guardianships
- Unlawful Detainers and Answers (Landlord/Tenant Issues)
- Referrals to Small Claims Advisors
- Monterey County Bar Association referrals
- Referrals to other community resources
- Small Claims forms

The Self-Help Center cannot help you with:

- Landlord/Tenant Disputes for Section 8 Housing or other situations
- Immigration
- Juvenile Court matters (delinquency, dependency-including CPS matters)
- Traffic
- Probate matters (such as wills, trusts and conservatorships)
- Dismissing Criminal Domestic Violence Restraining Orders
- Most General Civil Litigation
- Workers' Compensation
- Criminal matters of any type

County of Los Angeles Department of Consumer Affairs *Information Sheet*



County of Los Angeles
Department of Consumer Affairs
Information Sheet

Print Close Window

Small Claims Advisor Service

Free help for Small Claims Court litigants

GET ANSWERS TO YOUR QUESTIONS

Small Claims help is available to individuals and businesses suing or being sued in a Los Angeles County Small Claims Court. Our staff will provide you with information on small claims paperwork and procedures.

We're always open

Information is available 24 hours a day, 7 days a week. Call (213) 974-9759.

You can speak personally with an advisor

You can speak with a Small Claims Advisor, Monday through Friday from 8 a.m. to 4:30 p.m.

Visit our main office

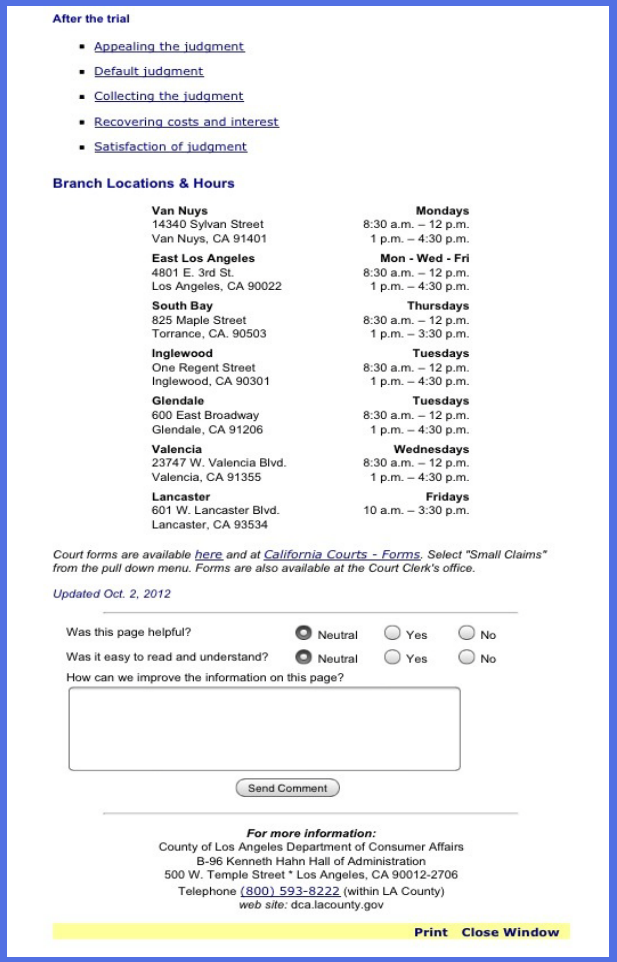
Department of Consumer Affairs
Kenneth Hahn Hall of Administration
500 West Temple Street, Room B-96
Los Angeles, CA 90012

We are open Monday through Friday from 8 a.m. to 4:30 p.m.

INFORMATION WE PROVIDE:

Before going to court

- How to file your case
- Where to file
- Time limits
- Naming the Plaintiff & Defendant
- Subpoenas / Witnesses
- Evidence
- Changing your court date
- Suing the party who is suing you
- Mediation
- Bad check / Stop payment
- Suing government agencies
- Preparing for court



After the trial

- Appealing the judgment
- Default judgment
- Collecting the judgment
- Recovering costs and interest
- Satisfaction of judgment

Branch Locations & Hours

Van Nuys 14340 Sylvan Street Van Nuys, CA 91401	**Mondays** 8:30 a.m. – 12 p.m. 1 p.m. – 4:30 p.m.
East Los Angeles 4801 E. 3rd St. Los Angeles, CA 90022	**Mon - Wed - Fri** 8:30 a.m. – 12 p.m. 1 p.m. – 4:30 p.m.
South Bay 825 Maple Street Torrance, CA. 90503	**Thursdays** 8:30 a.m. – 12 p.m. 1 p.m. – 3:30 p.m.
Inglewood One Regent Street Inglewood, CA 90301	**Tuesdays** 8:30 a.m. – 12 p.m. 1 p.m. – 4:30 p.m.
Glendale 600 East Broadway Glendale, CA 91206	**Tuesdays** 8:30 a.m. – 12 p.m. 1 p.m. – 4:30 p.m.
Valencia 23747 W. Valencia Blvd. Valencia, CA 91355	**Wednesdays** 8:30 a.m. – 12 p.m. 1 p.m. – 4:30 p.m.
Lancaster 601 W. Lancaster Blvd. Lancaster, CA 93534	**Fridays** 10 a.m. – 3:30 p.m.

Court forms are available here and at California Courts - Forms. Select "Small Claims" from the pull down menu. Forms are also available at the Court Clerk's office.

Updated Oct. 2, 2012

Was this page helpful? Neutral Yes No

Was it easy to read and understand? Neutral Yes No

How can we improve the information on this page?

Send Comment

For more information:
County of Los Angeles Department of Consumer Affairs
B-96 Kenneth Hahn Hall of Administration
500 W. Temple Street * Los Angeles, CA 90012-2706
Telephone (800) 593-8222 (within LA County)
web site: dca.lacounty.gov

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FLORIDA STATE COURTS SELF-HELP

Florida State Courts | Home | Courts | General Public | Legal Community | Press & Media

- Local Self-Help Centers
- Family Law Forms
- Family Law Rules and Opinions
- Free or Low-Cost Legal Aid
- Probate
- Landlord-Tenant Forms
- Small Claims
- Lawyer Referral
- Mediator Search
- Guardianship

The family forms below are forms that the Florida Supreme Court has approved for public use, based upon opinions the Court has issued. They are designed for use by everyone, but are especially helpful to individuals who wish to represent themselves (pro se) in court matters related to family law.

FAMILY LAW FORMS

Quick Links to Forms and Information on this page:

- **View the entire list of forms posted on the page now**

OR choose the following section titles:

- GETTING STARTED: General Form Information you need to read
  - General Information for Self-Represented Litigants &
  - Application for Determination of Civil Indigent Status
  - RESOURCES: Additional Resources you need to know about
- Petitions, Answers and Supporting Documents
- Service
- Procedural
- Discovery
- Motions
- Temporary/Concurrent Custody
- Special Cases
- Domestic, Repeat, Sexual and Dating Violence
- Adoption
- Name Change
- Paternity
- Parenting Coordinator
- Judgments and Orders

How the Forms Work

The forms below are listed numerically according to the section of ***Florida Rules of Court*** that pertains to family law, which is section 12. Therefore all the following forms have a number 12 prefix. Dates on the forms indicate the Supreme Court's effective date for the particular rule or form.

Currently, the forms are available either as an RTF, PDF or in a new WEB FORM version.

Still Need Help?

Contact Florida Courts Self-Help at selfhelp@flcourts.org or call (850) 921-0004 IF YOU HAVE A QUESTION ABOUT ANY OF THE FOLLOWING:

- **Content of a form**
- **Cannot find a form you need**
- **Have difficulty downloading the form**
- **Have a DISABILITY and cannot use the form in its current state**

Getting Started: What Do I Do Now?

Step 1: Read General Form Information & Instructions

You should read the General Information thoroughly before taking any other steps to file your case or represent yourself in court. Most of this information is **NOT** repeated in the forms listed below.

This information should provide you with an overview of the court system, its participants, and its processes. It should be useful whether you want to represent yourself in a pending matter or have a better understanding of the way family court works. A glossary of family law terms is also included.

READ THESE FORMS FIRST:

- General Information for Self-Represented Litigants - 12/2010 RTF / PDF
- Application for Determination of Civil Indigent Status - 11/01/07 RTF / PDF

Step 2: Review All Resources

These forms should be used in conjuction with the Florida Statutes and the Rules of Procedure. These resources are ***fundamental*** to your case. Please take time to review them as they provide additional information and forms you may need.

WARNING: This page does **NOT** list all forms for every situation. If you need a form that is NOT listed below, you will need to review other resources or prepare your own motion. To do this you will need to either consult the statutes and rules listed below or seek the advice of an attorney regarding what information should be included in the motion.

For Example: Looking for a form to use to request to appear by phone? Review the Rules of Judicial Administration for help.

- Florida Rules of Civil Procedure (PDF)
- Florida Rules of Family Law (PDF)
- Florida Rules of Judicial Administration (PDF)
- Florida Statutes and Laws

Florida State Courts Self-Help

INSTRUCTIONS FOR FLORIDA FAMILY LAW RULES OF PROCEDURE FORM 12.901(a), PETITION FOR SIMPLIFIED DISSOLUTION OF MARRIAGE

INSTRUCTIONS FOR FLORIDA FAMILY LAW RULES OF PROCEDURE FORM 12.901(a), PETITION FOR SIMPLIFIED DISSOLUTION OF MARRIAGE (10/11)

When should this form be used?

This form should be used when a husband and wife are filing for a simplified **dissolution of marriage**. You and/or your **spouse** must have lived in Florida for at least 6 months before filing for a dissolution in Florida. You may file a simplified dissolution of marriage in Florida if **all** of the following are true:

- You and your spouse agree that the marriage cannot be saved.
- You and your spouse have no minor or dependent child(ren) together, the wife does not have any minor or dependent children born during the marriage, and the wife is not now pregnant.
- You and your spouse have worked out how the two of you will divide the things that you both own (your **assets**) and who will pay what part of the money you both owe (your **liabilities**), and you are both satisfied with this division.
- You are not seeking support (**alimony**) from your spouse, and vice versa.
- You and your spouse have filed financial affidavits with the court or you have waived the filing of financial affidavits and you are satisfied with the financial disclosure received from the other spouse.
- You are willing to give up your right to **trial** and **appeal**.
- You and your spouse are both willing to go into the clerk's office to sign the petition (not necessarily together).
- You and your spouse are both willing to go to the **final hearing** (at the same time).

If you do not meet the criteria above, you must file a regular **petition** for dissolution of marriage.
This petition should be typed or printed in black ink. Each of you must sign the petition in the presence of a deputy clerk (in the clerk's office), although you do not have to go into the clerk's office at the same time. You will need to provide picture identification (valid driver's license or official identification card) for the clerk to witness your signatures.

What should I do next?

1. After completing this form, you should **file** the original with the **clerk of the circuit court** in the county where you live and keep a copy for your records.

   If you did not waive the filing of a financial affidavit in the petition, each of you must file a **Financial Affidavit**. Florida Family Law Rules of Procedure Form 12.902(b) or (c). You may document your agreement by signing a **Marital Settlement Agreement**, Florida Family Law Rules of Procedure Form 12.902(f)(3) and filing it with the **clerk of the circuit court** or you

Maryland Judiciary

- Domestic Relations Forms & Instructions

MARYLAND JUDICIARY

DOMESTIC RELATIONS FORMS

(in fillable PDF)

Need help with Maryland Custody Forms?
The Maryland Legal Aid Bureau posted an online automated interview tool for filing for custody, visitation and child support in Circuit Court. The tool will walk you through a series of questions about your case. At the end of the process, you will be provided with a PDF of a Maryland Domestic Relations form filled out and ready for your review.
A link to the automated interview tool is on the People's Law Library at http://www.peoples-law.org/node/760

Please read the **General Instructions** before you file your papers.
If you know the domestic relations form(s) you need, you can choose from the LIST to download the form(s). For most users, we recommend reviewing the following pages before choosing the form(s).

NOTE: If you need assistance completing the form(s), call the **Legal Forms Helpline** operated by the Women's Law Center of Maryland.

- I want to file a **NEW CASE**, **RE-OPEN** an old case, or I need to file to **ENFORCE** an existing court order concerning:
  Child Support
  Custody/Visitation
  Divorce
  Name Change
- I have received court papers and need to file a written response or **ANSWER** to a case.
- I have already filed court papers, but have not been able to serve the other side. I need to file a **MOTION FOR ALTERNATE SERVICE**.
- I have already filed court papers, and I have already had the other side properly served. The other side has not filed an Answer and I would like the case to proceed. I need to file a **REQUEST FOR ORDER OF DEFAULT**.
- I want to **register and/or enforce a custody order issued by another state**
- **Filing Fees**. Information on fees and court costs.
- **Service of Process**. Information on how to have your forms filed with the court.

Maryland Judiciary

Department of Family Administration

Self-Help Centers

MARYLAND JUDICIARY

DEPARTMENT OF FAMILY ADMINISTRATION

Administrative Office of the Courts

Family Law Self-Help Centers

The following information: provides an overview of Maryland's Family Law Self-Help Centers. The hours of operation listed for each program are subject to change; please check the website or call first.

ALLEGANY
Please visit the following link for the most recent information:
http://mdcourts.gov/circuit/allegany/family.html

ANNE ARUNDEL
Please visit the following link for the most recent information:
http://www.circuitcourt.org/family-law-cases-mainmenu-36/62

BALTIMORE CITY
Please visit the following link for the most recent information:
www.baltocts.state.md.us/divisions/family.html

BALTIMORE
Please visit the following link for the most recent information:
http://www.baltimorecountymd.gov/Agencies/circuit/family/index.html

CALVERT
Please visit the following link for the most recent information:
mdcourts.gov/clerks/calvert/familyservices.html

CAROLINE
Please visit the following link for the most recent information:
mdcourts.gov/circuit/caroline/family.html

CARROLL
Please visit the following link for the most recent information:
ccgovernment.carr.org/ccg/circuit-court/family-law.aspx

CECIL
Please visit the following link for the most recent information:
mdcourts.gov/clerks/cecil/family.html

CHARLES
Please visit the following link for the most recent information:
mdcourts.gov/clerks/charles/familyservices.html

DORCHESTER
Please visit the following link for the most recent information:
mdcourts.gov/circuit/dorchester/familyservices.html

FREDERICK
Please visit the following link for the most recent information:
mdcourts.gov/family/frederick.html#pro se

GARRETT
Please visit the following link for the most recent information:
www.garrettcounty.org/CircuitCourt/CircuitCourt.aspx?tabid=1

HARFORD
Please visit the following link for the most recent information:
www.courts.state.md.us/family/harford.html

HOWARD
Please visit the following link for the most recent information:
mdcourts.gov/circuit/howard/familylawprogram.html

KENT
Please visit the following link for the most recent information:
mdcourts.gov/family/kent.html

MONTGOMERY
Please visit the following link for the most recent information:
www.montgomerycountymd.gov/cidtmpl.asp?
url=/content/circuitcourt/self_Representing/index.asp

PRINCE GEORGE'S
Please visit the following link for the most recent information:
www.co.pg.md.us/Government/JudicialBranch/Circuit/law_foundation.asp

QUEEN ANNE'S
Please visit the following link for the most recent information:
mdcourts.gov/clerks/queenannes/famservices.html

SOMERSET
Please visit the following link for the most recent information:
mdcourts.gov/circuit/somerset/familyservices.html

ST. MARY'S
Please visit the following link for the most recent information:
mdcourts.gov/clerks/stmarys/familyservices.html

TALBOT
Please visit the following link for the most recent information:
mdcourts.gov/clerks/talbot/family.html

WASHINGTON
Please visit the following link for the most recent information:
mdcourts.gov/clerks/washington/familyservices.html

WICOMICO
Please visit the following link for the most recent information:
mdcourts.gov/family/wicomico.html#pro se attorney

WORCESTER
Please visit the following link for the most recent information:
http://mdcourts.gov/circuit/worcester/family.html

The People's Law Library of Maryland: Self Help Services

The People's Law Library of MARYLAND

About | Contact Us | Legal Services Directory | Glossary | RSS | Search

Get Help Now

How Do I
- Evaluate My Situation
- File a Case
- Prepare My Case
- Appeal a Decision

Topics
Consumer
Criminal
Domestic Violence
Education
Employment
Family Law
Government Benefits & Services
Health
Housing
Motor Vehicles
Senior Citizens
Wills/Estates/Probate
Youth Law
Other Legal Issues

Eastern Shore District Court Help

Non-English Help

News

Free Legal Help by Date

editor login

Self-Help Services

In Maryland there are a number of organizations that can provide legal information to help you represent yourself and help with forms to file. Legal services may include help completing forms, answering questions about legal problems, and preparing for your day in court.

Some of the kinds of cases the programs may be able to assist you with include:

- Child Support
- Contracts, warranties and/or consumer disputes
- Custody/Visitation
- Debt and Bankruptcy
- Divorce
- Domestic Violence/Peace Orders
- Employment and wage claim issues
- Landlord/Tenant
- Name Change
- Replevin/Detinue
- Small Claims
- Wills, estate planning, probate, living wills

Programs may be able to provide referrals for cases too complex for clients to persue on their own.

The Maryland Judiciary Department of Family Administration runs family law self-help centers throughout the state of Maryland. Attorneys are available to assist pro se litigants fill out family law forms.

Access to Justice Commission: The Maryland Access to Justice Commission will develop, consolidate, coordinate and implement policy initiatives to expand access to and enhance the quality of justice in civil legal matters for persons who encounter barriers in gaining access to Maryland's civil justice system.

Print | Email
Text Size: 100%

Other Organization Links
- Family Law Self-Help Centers
  Self-help Centers run by the Judiciary's Department of Family Administration
- Allegany Law Foundation Family Law Self Help Clinic
- Ask A Lawyer in the Law Library
  At the Anne Arundel County Public Law Library
- Glen Burnie District Court Self Help Center
- Just Advice
- Maryland Judiciary Ombudsmen
- Maryland Access to Justice Commission

Judiciary Ombudsman: The mission of the office of the Ombudsman for the Maryland State Court System is to provide a confidential, informal, independent and safe communications channel where court users can obtain informal assistance in surfacing and resolving issues.

Allegany Law Foundation Family Law Self Help Clinic: Allegany Law in co-operation with the Allegany County Circuit Court provides legal assistance to individuals in the community in filling out court forms in family law cases including divorce, custody, visitation, child support and name changes.

Ask A Lawyer in the Law Library: At the Anne Arundel County Public Law Library. Talk with a volunteer lawyer for up to 20 minutes about your civil, non-family legal problem for free! No appointment is necessary. Just check-in at the law library's information desk. 410-222-1387 library@circuitcourt.org New dates have also been added at the North County Area Library.

Charles County Family Law and General Civil Practice Clinics are sponsored by the Charles County Bar Association. The Family Law Clinic is open on Tuesdays from 9:00 a.m. to Noon. A volunteer lawyer will be available for consultation on matters such as divorce, child support, custody, visitation, adoption, name change, paternity, and domestic violence.

The General Civil Practice Clinic is open on the first and third Wednesdays of each month from 9:00 a.m. to Noon. A lawyer will be available for consultation on general civil matters. The clinics are located in the Charles County Circuit Courthouse next to Courtroom F.

Courthouse Family Law Clinic: At the Washington County Circuit Court. This clinic is provided through a contract with the Maryland Volunteer Lawyers Service ("MVLS"). Every Thursday from 8:00 a.m. until 1:00 p.m..

Glen Burnie District Court Self Help Center: The Self Help Center at the District counrt in Glen Burnie provides limited legal services for people who are not represented by an attorney. Limited legal services include help completing forms, answering questions about legal problems, and preparing for your day in court. If you need additional help, we may refer you to mediation, other legal organizations, or the private bar. Monday - Friday from 8:30am - 4:30pm.

Howard County Civil Law Self-Help Center: The Civil Law Self-Help Center is open on Tuesdays from 9:00 a.m. - 12:00 p.m. No appointment is necessary. The Civil Law Self-Help Center is located in the Law Library in the Circuit Court. An attorney provides free legal assistance in civil non-domestic matters, to walk-ins. Some areas of the law that are civil include, landlord/tenant, contracts, small claims, advance medical directives, expunging records and homeowner association disputes. Visitors must be self-represented and have low income to qualify for service. If you have any questions, please contact the Law Librarian at the Circuit Court at (410) 313-2135.

Just Advice: Sit down with a lawyer at the Legal Grind to discuss any of your legal questions and get brief advice. The cost is $10 - cash only please. Coffee & snacks included. We can also help with expungement of court records for only the cost of court filings. Just Advice will assist with family law, housing, criminal, employment, expungement, insurance, SSI, tax, elder law cases.

Need help with Maryland Custody Forms?

If you cannot find an attorney to assist you to file for custody or visitation, to file an answer to a complaint for custody or visitation, to file a motion to modify a custody or visitation order, or to seek sanctions for contempt of a custody or visitation order, you can get help online through an online automated interview. This interview will guide you to complete the court forms you need to file.

The Maryland Legal Aid Bureau posted this online tool for filing the Circuit Court forms for custody, visitation and contempt, as well as the form answers to these actions in Circuit Court. The tool will walk you through a series of questions about your case. The information you provide on the website during this interview will be used to select the proper Court form to ask for the help you need from the Court, and to complete the information required by the form. Using this website, you will be able to print a completed form to file a Complaint for Custody, a Complaint for Visitation, an Answer to a Complaint for Custody or Visitation, a Counter Complaint for Custody or Visitation, a Motion to Modify Custody or Visitation, a Motion for Contempt, or an Answer to a Motion for Custody, Visitation, or Contempt.

At the end of the process, the website can email you a copy of the PDF of the proper Maryland Domestic Relations form filled out and ready for your review. Once you sign this form and serve it on the other party, the form can be filed at the local Circuit Court. Find the interview at Maryland Court Forms interview.

Originally posted by Michael Craven on Sep 03, 2010, last updated by Michael Craven on Aug 31, 2012

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Is this legal advice?

This site offers legal information, not legal advice. We make every effort to ensure the accuracy of the information and to clearly explain your options. However we do not provide legal advice - the application of the law to your individual circumstances. For legal advice, you should consult an attorney. The Maryland State Law Library, a court-related agency of the Maryland Judiciary, sponsors this site. In the absence of file-specific attribution or copyright, the Maryland State Law Library may hold the copyright to parts of this website. You are free to copy the information for your own use or for other non-commercial purposes with the following language "Source: Maryland's People's Law Library – www.peoples-law.org. © Maryland State Law Library, 2010."

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PRESENTATION OUTLINE

ETHICAL ISSUES ENCOUNTERED WHEN DEALING WITH AN UNREPRESENTED PERSON

GEORGE MASON INN OF COURT
NOVEMBER 28, 2012

TIME: 7:45 P.M. until 9:00 P.M.

I. Background

A. Problems with *pro se* persons as adversaries, as potential clients, and for the Court

B. Increasing number of *pro se* individuals in Courts across the country

C. Statistics for Fairfax County

D. Describe method of presentation

II. The Unrepresented Person as Putative Client

A. When an "informal" contract forms an attorney-client relationship

1. Model Rule 1.18: Duties to Prospective Client

2. VA Rule 1.1: Duties to Prospective Client

3. Restatement § 14: Formation of a Client-Lawyer Relationship

4. see also § 14, Comment C: The Client's Intent

5. Restatement § 15: A Lawyer's Duties to a Prospective Client

6. Restatement § 70: Attorney-Client Privilege - "Privileged Persons"

7. see also § 70, Comment C: An Initial Consultation

B. Providing limited legal services to an unrepresented person

1. Dealing with unrepresented persons

2. Limited representation

a. Model Rule 1.2: Scope of Representation and Allocation of Authority between Lawyer and Client

b. VA Rule 1.2: Scope of Representation

c. VA Rule 4.3(b): Dealing with Unrepresented Persons

d. VA Rule 6.5: Nonprofit and Court-Annexed Limited Legal Services Programs

e. see Comments 6 and 7, Agreements Limiting Scope of Representation

f. *Sharp v. Sharp*, 2006 WL 3088067 (Va. Cir. Ct.): Complainant and respondent were co-tenants of real estate property. The respondent appeared *pro se* during a hearing before the commissioner in chancery, but then hired an attorney who appeared in a limited capacity at several other hearings. On appeal, the court sought to determine whether or not the attorney could appear in a limited capacity and whether the attorney's appearance qualified him as official "attorney of record." The court found that it was not bound by agreements made between client and attorney and that a court may "require more of an attorney than mere compliance with the ethical constraints of the Rules of Professional Conduct." The court found that the attorney could make a motion to withdraw once he completed the tasks agreed upon, but that the court had ultimate discretion in granting the withdrawal.

g. unbundling of legal services

    i. see Restatement § 19: Agreements Limiting Client or Lawyer Duties

    ii. see also Comment C: Limiting a Representation

h. use of engagement letter

    i. Restatement § 19, Comment E: Contracts to Increase a Lawyer's Duties

I. exposure to malpractice

    i. Restatement § 46: Documents Relating to a Representation

    ii. see Restatement § 50: Duty of Care to a Client

    iii. see Restatement § 51: Duty of Care to Certain Non-Clients

3. Standard forms

   a. obtaining forms for an unrepresented person

   b. explaining to an unrepresented person the meaning of questions or entries to be completed on a form

   c. completing a form for an unrepresented person

   d. *Standing Comm. on Legal Ethics, Virginia State Bar Ass'n Legal Ethics Op. 1761* (2002) (can be found at http://www.vacle.org/opinions/1761.htm)

      I. Legal aid staff may provide legal forms to *pro se* litigants, so long as no assistance is provided in the completion of those forms.

4. Advising the unrepresented person regarding strategy

   a. the strength of case

   b. advice regarding facts or evidence

   c. duty to investigate facts

      I. see Model Rule 2.1: Advisor

      ii. VA Rule 2.1: Advisor

      iii. See also Model Rule 2.1, Comments 2 and 3 regarding 'technical advice" to clients who are either experienced or inexperienced in legal matters

5. Ghostwriting

   a. notice to Court re: scope of representation

   b. certification or identification on pleadings

   c. *Laremont-Lopez v. Southeastern Tidewater Opportunity Ctr.,* 968 F. Supp 1075 (E.D. Va. 1997): Over a period of time, *pro se* plaintiffs submitted pleadings that had been written by attorneys pursuant to discrete-task representation contracts. The attorneys did not sign the pleadings, and in most cases did not appear as

counsel of record. When ordered to show cause by the court as to why they should not be held in contempt of court, attorneys argued that the professional relationships created with the litigants ended once they had drafted the pleadings. Court held that there was insufficient evidence to show that the attorneys knowingly misled te court or intentionally violated ethical or procedural rules and declined to impose sanctions. However, court stated that the practice of ghostwriting pleadings without acknowledging authorship and without asking court approval to withdraw from representation was inconsistent with Fed. R. Civ. P. 11 and Rule 83.1(G) of the Local Rules for the United States District Court for the Eastern District of Virginia. Court stated that allowing attorneys to ghostwrite pleadings for *pro se* plaintiffs abused additional leeway given to *pro se* filings.

d. *Walker v. American Assn. of Professional Eye Care Specialists, P.C., d/b/a AAPECS, et al.*, 597 S.E.2d 47 (Va. 2004)

   i. Attorney, who informed the *pro se* party that he would not represent her in the matter, arranged for a motion to be delivered to the clerk of the circuit court with a cover letter asking for the paper to be filed on behalf of the plaintiff, along with a check for the filing fee, drawn on the attorney's trust account from a retainer previously paid to the attorney by the *pro se* party before representation was terminated.

   ii. The Supreme Court of Virginia ruled that the attorney was not the plaintiff's counsel of record because the attorney's protection of the *pro se* litigant's legal interests was consistent with his duty, pursuant to Rule 1.16(d), to take steps to extent reasonably practicable to protect *pro se* litigant's interests upon termination of representation

e. Federal Rule of Civil Procedure 11. Signing Pleadings, Motions and Other Papers; Representations to the Courts; Sanctions

f. VA Code 8:01-271.1. Signing of Pleadings, Motions, and Other Papers; Oral Motions; Sanctions

g. *Standing Comm. On Legal Ethics, Virginia State Bar Ass'n Legal Ethics Op. 1127* (1988)

   i. It is ethically permissible for a lawyer to advise and assist a

pro se litigant and provide: general legal advice, recommendations for a course of action to follow discovery, legal research, and redrafting of documents prepared by the *pro se* litigant.

ii. A lawyer may prepare discovery requests, pleadings or briefs for signature by the *pro se* litigant.

iii. However, failure to disclose that the attorney provided active or substantial assistance may constitute a misrepresentation to the Court.

6. Withdrawal from representation, i.e., making a client *pro se*

a. Model Rule 1.16: Declining or Terminating Representation

i. see also Model Rule 1.16, comments 8 and 9, "Optional Withdrawal"

b Va Rule 1.16: Declining or Terminating Representation

c. Restatement of § 31: Termination of a Lawyer's Authority

i. see also, § 31, Comment C: Court approval

ii. see also, § 31, Comment F: A lawyer's withdrawal

d. Restatement § 77: Duration of Privilege

e. Restatement § 32: Discharge by a Client and Withdrawal by a Lawyer

i. see also § 32, Comment C: Rationale for lawyer-withdrawal rules

ii. see also § 32, Comment D: Approval of a tribunal

f. Restatement § 33: A Lawyer's Duties When a Representation Terminates

i. see also § 33, Comment B: Protecting a client's interest when a representation ends

ii. see also § 33, Comment C: Client confidences

iii. see also § 33, Comment I: The duty not to take unfair advantage of a former client

g. Restatement § 40: Fees on Termination

i. see also § 40, Comment D: The measure of compensation when a lawyer withdraws

III. The Unrepresented Person as an Adversary

A. Before trial

B. Court rules regarding unrepresented litigants

1. Federal Rule of Civil Procedure 11

2. state

C. Contact with an unrepresented adversary

1. Model Rule 4.3: Dealing with Unrepresented Persons

2. Va Rule 4.3: Dealing with Unrepresented Persons

3. Restatement § 103: Dealing with an Unrepresented Non-client

4. *Barrett v. Virginia State Bar,* 611 S.E. 2d 375 (Va. 2005): the Virginia Supreme Court determined that there was insufficient evidence to support the State Bar's finding that Barrett's (the attorney) statements to his unrepresented wife were legal advice. Rather the Supreme Court determined the statements were his opinion of the legal situation. However Justice Keenan's dissent is noteworthy and worth reading.

5. Va Rule 3.4(j): Fairness to opposing party and counsel

6. Va Rule 3.1: Meritorious claims and contentions

D. At trial

1. Handling objections made by an unrepresented adversary

2. General treatment of an unrepresented adversary in the courtroom

a. at a bench trial

b. at a jury trial

3. Insistence on compliance with procedural rules

IV. Treatment of Unrepresented Persons by Various Tribunals

A. Making the treatment of unrepresented parties more uniform among tribunals

B. Making access to the Court easier for unrepresented parties

1. Virginia measures

a. Resources for Pro Se Litigants contained in handbooks and/or provided by different courts

i. Eastern District of Virginia handbooks:

(a). Alexandria, Norfolk/Newport News/Richmond

(I). United States District Court Eastern District of Virginia Website: http://www.vaed.uscourts.gov/resources/pro%20se/index.html

ii. Western District of Virginia handbook:

(a). United States District Court Western District of Virginia Website: http://www.vawd.uscourts.gov/Clerks/

iii. Richmond Bar's Pro Se Litigant Project provides a brochure "Your Guide to Civil Litigation in General District Court"

(a). The Bar Association of the City of Richmond Website: http://www.richmondbar.org/brochures.htm

b. Each handbook and brochure specifies that all Pro Se litigants must follow the rules of the jurisdiction: State and Local Court rules or Federal and Local Court rules

c. These handbooks and brochures also enumerate the various resources and aid available to Pro Se litigants in Virginia.

i. Virginia provides legal resources for pro se litigants.

(a). Legal Services of Northern Virginia, (703) 684-5566

(b). Alexandria Bar Lawyers Referral, (703) 548-1105

©. Alexandria Law Library, (703) 838-4077

(d). Virginia Law Referral Service, (800) 552-7977 or vsb.org

(e). Senior Law Center, Norfolk, VA (757) 627-3232

ii. Virginia provides legal aid resources for pro se litigants

(a). May file an Application to Proceed Without Prepayment and Affidavit

(b). VALegalAid.org

©. Legal Aid Society of Eastern Virginia

(d). Central Virginia Legal Aid Society, (804) 648-1012

(e). 24-hour Legal Aid Helpline: 866-LEGL-AID

d. Court forms can be found on Virginia's Judicial System website: http://www.courts.state.va.us/forms/district/home.html

2. other states

a. http://www.courts.ca.gov/selfhelp.htm?genpubtab

b. http://www.flcourts.org/gen_public/family/forms_rules/index.shtml#petsup

c. http://www.courts.ca.gov/partners/documents/HelpThemselves.pdf

d. http://www.courts.state.md.us/family/forms/domrel.html

V. Panel Response to Attendees Questions

Presentation Faculty
The Ethical Issues in Dealing with a *Pro Se* Litigant
George Mason Law School Inn of Court

November 28, 2012
7:45 p.m. until 9 p.m.

Judge Lawrence B. Hagel

Judge Hagel was confirmed by the U.S. Senate and appointed to the United States Court of Appeals for Veterans Claims by President Bush in 2003.

Immediately prior to his appointment, Judge Hagel was the General Counsel of the Paralyzed Veterans of America. In that position he represented and advised the organization and individuals regarding matters related to the Americans with Disabilities Act, the Air Carrier Access Act, the Rehabilitation Act and similar state statutes as well as supervising the organization's corporate legal affairs. He also represented the organization and individuals regarding matters related to veterans benefits. Judge Hagel served as a Marine infantry platoon commander, headquarters company commander, and field advisor to the Army of the Republic of Viet Nam during an extended tour in Viet Nam and later as a Marine Judge Advocate. His experience as a judge advocate was centered on litigation, both criminal and civil and involved appearances in U.S. District courts, the Federal Labor Relations Authority, the Mediation and Conciliation Service and in labor arbitration.

Judge Hagel is a graduate of the U.S. Naval Academy and the University of the Pacific McGeorge School of Law and the National Law Center of the George Washington University where he obtained a Masters of Law Degree (Labor Law) with highest honors.

Judge Jonathan Thacher

Judge Thacher was appointed to the Fairfax Circuit Court in 1998.

Prior to his appointment he served as a substitute judge in Fairfax County General District Court form 1986 until his election to the General District Court Bench in 1994. Prior to taking the bench, Judge Thacher's prior careers include a U.S. Army Captain, Special Agent Naval Investigative Service, Minority Counsel to Senator Robert Dole (work pertaining to the Senate Judiciary Sub Committee Investigating Individuals with Interests in Libya), and a partner in the law firm of Thacher, Swinger and Cay in Fairfax.

Judge Thacher received his BA from the University of Miami and his JD from George Mason University School of Law, with distinction in 1980.

Joseph B. Dailey

Mr. Dailey is currently an associate at The Magee Law Firm located in McLean, Virginia. Prior to joining that firm, he was an assistant public defender for Fairfax County. Mr. Dailey received his law degree in 2003 from George Mason University School of Law.

Richard Driscoll

Richard W. Driscoll is a founding member of the law firm Driscoll & Seltzer, PLLC, which is located in Alexandria, Virginia. He is primarily involved in litigation in state and federal courts, as well as administrative agencies, in Virginia, the District of Columbia and Maryland. His experience is centered in professional liability, professional ethics, insurance defense, insurance coverage and commercial litigation. He is rated AV Preeminent by Martindale Hubbell.

Mr. Driscoll is a member of DRI's Professional Liability Steering Committee, Claims & Litigation Management Alliance (Professional Liability Committee; Insurance Coverage Committee), Professional Liability Underwriters Society, Virginia Association of Defense Attorneys and the DC Defense Lawyers Association. During his more than twenty years of practice, he has represented various professionals (attorneys, accountants, real estate brokers and insurance brokers/agents).

Mr. Driscoll received his Bachelor of Arts degree (English Literature) from the University of Utah, where he was Senior Class President. He received a Juris Doctor from the American University, Washington College of Law, where he was a member of the National Moot Court Team. He is licensed to practice law in all state and federal courts of the District of Columbia, Virginia and Maryland.

Paul Hayden

Paul Hayden, an Associate Deputy General Counsel in the Office of General Counsel (Legal Counsel), U.S. Department of Defense, provides legal advice on sensitive national security matters related to all manner of pending litigation in the emerging law governing detention authority, including discovery, intelligence equities, and the application of the law of war.

Prior to his Department of Defense service, Paul served as Deputy Director of the Office of Intergovernmental and Public Liaison at the U.S. Department of Justice, where he was a primary liaison for the Attorney General of the United States to state, local, and tribal governments, as well as legal and minority organizations and law enforcement organizations.

From 2004 until 2007, Paul served as a Special Assistant at the U.S. Department of Veterans Affairs working primarily on legal and congressional affairs issues. From 1999 until 2004, Paul was the Deputy Director of Legislative Affairs for the Veterans of Foreign Wars of the U.S. where he was regularly called upon to provide Congressional testimony on veteran- and military-related issues. From 1997 until 1999, Paul served on the staff of Arizona Senator John McCain.

Paul is a veteran of the U.S. Army and served with the 1st Infantry Division in Desert Shield/Storm, receiving an Honorable discharge in 1998.

Paul earned his B.A from the University of Arizona, summa cum laude and Phi Beta Kappa. He earned his J.D. from George Mason University, where he was a moot court board member and student president of the George Mason American Inn of Court.

Jennifer S. Joffe

Ms. Joffe. is a Shareholder of Colten Cummins Watson & Vincent P.C., where she specializes in complex family law counseling and litigation. Prior to joining the law firm, Ms. Joffe clerked for the Honorable Jane Marum Roush of the Fairfax County (Virginia) Circuit Court and for the Honorable Katherine D. Savage of the Montgomery County (Maryland) Circuit Court. Ms. Joffe is an active member of the Virginia State Bar, the Fairfax County Bar Association, the George Mason American Inn of Court, and the Virginia Women Attorneys Association. She also serves as Vice Chair of the Fairfax County Circuit Court Committee and Chair of the Fairfax County Domestic Relations Subcommittee. In 2011 and 2012, Ms. Joffe was recognized as a Rising Star by the Virginia Super Lawyers. Ms. Joffe received her law degree in 2001 from the American University Washington College of Law in Washington, D.C. She received a Master of Social Work degree from the University of Michigan and a Bachelor of Arts degree from the Ohio State University.

Deborah S. Olin

Ms. Olin chose law as a second career after twenty years as a businesswoman. She has practiced family law since her admission to the bar. Prior to entering private practice, Ms. Olin served as Arlington County Assistant County Attorney, representing the Department of Human Services, and her workload included litigating child protective services cases. Her practice now focuses on juvenile justice and domestic relations law. She has also consulted for the Women's Center of Northern Virginia regarding the development of the Center's domestic violence prevention program, and she has led training sessions for various organizations regarding child abuse and domestic violence. Ms. Olin is a frequent guest on local radio shows. She is a 1999 graduate of The College of William and Mary Marshall-Wythe School of Law.

Wlliam B. Porter

Mr. Porter is associated with the law firm of Blankenship and Keith, PC. He represents corporate and individual clients in a wide variety of commercial and civil matters. Mr. Porter received his B.A. from Randolph-Macon College in 1992 and his law degree from George Mason School of Law in 1997 with honors.

Lorrie A. Sinclair

Ms. Sinclair is a principal in the Leesburg, Virginia, firm of Sinclair Taylor LLC. In addition to her varied legal practice, Ms. Sinclair also serves currently as both a Special Justice and Substitute Judge. She is is a former prosecutor and was the legal instructor at the Northern Virginia Criminal Justice Academy. Ms. Sinclair is graduate of George Mason University and The College of William and Mary Marshall-Wythe School of Law.

Kathleen M. Uston

Ms. Uston is currently Assistant Bar Counsel for the Virginia State Bar. Prior to serving in this capacity the had a general law practice. The areas of law in which she was most engaged were: legal ethics, civil litigation, landlord and tenant, residential real estate and contracts. She received her B.A. from Miami University and her J.D. from George Mason University School of Law.

Louise Martin

Ms. Martin is a third-year law student at George Mason School of Law. She is currently retained by the firm of Bronley & Binnall, PLLC in Fairfax, VA. At George Mason, Ms. Martin is a member of the Journal of Law, Economics and Policy. She completed her undergraduate studies at George Mason University with a concentration in Administration of Justice and Russian.

Therese Waymel

Ms. Waymel is a third-year law student at George Mason School of Law. She is currently retained by the firm of Pressler & Senftle, P.C. At George Mason, Ms. Waymel competes as a member of the Trial Advocacy Board and is the Vice President of Academic Competitions for the George Mason Sports and Entertainment Law Association. Ms. Waymel completed her undergraduate studies at Purdue University with a concentration in both political science and history.